

Exhibit A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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SARAH H. BLACK, et al., :
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Plaintiff, : 16-CV-1238 (CBA) (ST)
:
August 6, 2019
:
V. : Brooklyn, New York
:
ANTHONY DAIN, et al., :
:
Defendant. :
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TRANSCRIPT OF CIVIL CAUSE FOR MOTION HEARING
BEFORE THE HONORABLE STEVEN TISCIONE
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

For the Plaintiff: MICHAEL SCHAAALMAN, ESQ.
SHARAN ABRAHAM, ESQ.

For the Defendant: HARRIS KATZ, ESQ.
ANDREW MANCILLA, ESQ.
ROBERT FANTONE, ESQ.
ALEX RU, ESQ.
ANTHONY DAIN, PRO SE

Audio Operator:

Court Transcriber: ARIA SERVICES, INC.
c/o Elizabeth Barron
102 Sparrow Ridge Road
Carmel, NY 10512
(845) 260-1377

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1 THE COURT: Civil cause for motion hearing,
2 16-CV-1238, Black, et al. v. Dain, et al.

3 Counsel, please state your appearances for
4 the record.

5 MR. SCHAAALMAN: Good afternoon, your Honor.
6 Michael Schaalman and Sharan Abraham on behalf of the
7 plaintiffs.

8 MR. KATZ: Good afternoon, your Honor.
9 Harris Katz from the law firm Winget Spadafora &
10 Schwartzberg for the defendant Ira Salzman.

11 MR. MANCILLA: Good afternoon, your Honor.
12 Andrew Mancilla and Robert Fantone for defendants
13 Cherie Wrigley, Esaun Pinto, and CPI Investigations.

14 MR. RU: Good afternoon, your Honor. Alex
15 Ru from Kennedys for defendants Cohenson and Raphan,
16 P.B.

17 THE COURT: Can I just have the spelling of
18 your last name?

19 MR. RU: R-u.

20 THE COURT: Thank you.

21 MR. DAIN: Good afternoon, your Honor.
22 Anthony Dain appearing pro se.

23 THE COURT: All right. Before I deal with
24 the privilege motion, let me just turn to the motion to
25 compel that was filed by defendant Salzman. It's just

1 easier to get that one out of the way first. As I
2 understand it, is there a second damage expert report
3 that's been provided at this point?

4 MR. SCHAALMAN: Your Honor, what's been
5 provided -- and I have a copy to give you. In looking
6 at it, it's about 500 pages worth of backup
7 information, very detailed information to support the
8 expert report in terms of the scheduling of 1, 2, 3,
9 and 4. There are virtually no additional documents
10 other than what we already produced back in May and
11 this last production of these backup charts, which
12 identify each and every expense of each and every law
13 firm for each and every trust (ui). That's the core of
14 our damages case and that has been produced as of July
15 31st (ui).

16 THE COURT: And that's in addition to the
17 expert reports.

18 MR. SCHAALMAN: Yes.

19 THE COURT: That's kind of a supplement to
20 the expert report.

21 MR. SCHAALMAN: Yes, it would be (ui)
22 supplement (ui).

23 THE COURT: Okay. Explain to me why that's
24 not sufficient to answer your questions.

25 MR. KATZ: Your Honor, the problem with the

1 documents that they've provided previously and the ones
2 they've provided on the eve of their deadline to oppose
3 the motion is, they don't answer all of the questions
4 that were in our supplemental interrogatories, which
5 they previously agreed to answer. In particular, these
6 spreadsheets and the numbers on these documents don't
7 tell us in all instances where the source of the
8 payments came from. That's important because Judge
9 Amon has already dismissed claims that relate to
10 Bernard Black personally. So depending on the source
11 of the payments --

12 THE COURT: In other words, there would only
13 be damages if they were paid by the trust.

14 MR. KATZ: Yeah, I mean, potential damages,
15 you know. We deny that but --

16 THE COURT: Agreed.

17 MR. KATZ: But in addition to that, what
18 they agreed to provide was --

19 THE COURT: I thought their interrogatory
20 response said that all of these expenses were paid by
21 the trust. I mean, you can certainly disagree with
22 that as a factual matter but if I remember correctly,
23 their supplemental response said that all of those
24 expenses were paid and they list out which trusts.
25 Isn't that in the schedules?

1 MR. KATZ: Your Honor, I don't believe the
2 information they provided indicates that the trusts
3 paid these expenses. They've claimed, even on the
4 documents that we have here, that some of these
5 payments were made through purported loans. We believe
6 they were collusive loans that aren't enforceable, but
7 they weren't necessarily paid through the trust's
8 money, so that's one of the issues.

9 The other issue, if you look at the -- their
10 purported accounting expert report, the accountant says
11 they relied on information that Mr. Black provided to
12 them, information we don't have. So the
13 interrogatories --

14 THE COURT: Or you may have. You don't know
15 what the information is.

16 MR. KATZ: Certainly the information we
17 sought in the interrogatories was that very
18 information. The purported basis -- so in other words,
19 what we were asking for -- if you have an invoice that
20 you're claiming as damages, what's the Bates stamp
21 number of it, what's the source of payment for that
22 invoice, what was the purpose of the funds, okay?
23 That's important in terms of what they're claiming is
24 damages, and why is it purportedly recoverable against
25 the trust?

1 They're actually claiming that the trusts
2 owe this money. That's their claim. They're not
3 saying that the trust paid these funds -- I mean, in
4 some instances, they might be claiming that. But with
5 respect to money that they claim they've incurred on
6 their side, they're claiming they've spent monies that
7 they're trying to have the trusts now repay to them, so
8 it's their case. We are entitled to information to
9 challenge all of their damages, and they can't hide
10 behind a report that says Bernard Black has provided
11 all of this information.

12 We're seeking the information
13 interrogatories, they agreed to provide it, and then
14 they decide it's too much work so we're not going to
15 provide it and we'll just give you a spreadsheet on the
16 eve of opposing my motion. They didn't even
17 voluntarily give us this document. So I think they've
18 already agreed to provide it, it's their case, and they
19 can provide it. They're not saying they can't provide
20 each invoice, tell me the Bates stamp number, the
21 source of the payment.

22 If it came from Bernard Black's personal
23 bank account, I'd like to know that. If it came from
24 the estate, I want to know that. What was it used for?
25 What was the exact purpose of this purported money and

1 legal expense and why it is purportedly recoverable
2 against the trusts or any defendant in this action? I
3 think it's an appropriate request given this case.

4 THE COURT: That's more of a legal theory
5 than -- I understand the first two parts but the last
6 part is more of a legal theory.

7 MR. KATZ: The last part is more of a
8 contention-type interrogatory. But, again, they agreed
9 in the joint report -- I made this motion before. They
10 agree -- this is on their letterhead, paragraph 3 in
11 the joint report. They agree to provide answers to all
12 sub-parts of the interrogatories. Why am I -- I'm back
13 here again making the same arguments that they've
14 already agreed to answer.

15 THE COURT: Okay. Why haven't you provided
16 that additional information?

17 MR. SCHAALMAN: Your Honor, we have and that
18 is contained in these documents that we now have
19 produced. In other words, the theory of damages is
20 that these funds were paid on behalf of the trusts and
21 the monies are going back to the trusts, not to the
22 individual, not to Mr. Black, not to any other trustee.
23 They're going into the trusts because these are now an
24 obligation of the trust. We have listed by every law
25 firm, we have provided every law firm's bills, and we

1 have provided -- the source of all these payments are
2 in those documents. We provided it transaction by
3 transaction. They know the purpose of each of those
4 payments because they have the invoices by the law
5 firms. This particular chart in the supplemental
6 information is law firm by law firm, all of the
7 obligations that have been paid to the law firms by the
8 (ui) trusts, and it gives the source of where these
9 funds came from, whether they came from loans or they
10 came from -- and which accounts they were paid from.

11 THE COURT: And did you provide all the loan
12 information?

13 MR. SCHAAALMAN: Yes.

14 THE COURT: In this, or is that previously?

15 MR. SCHAAALMAN: Previously. In addition, I
16 think in fairness, they made an interrogatory which is
17 focused on the allegations in the complaint. The
18 allegations in the complaint certainly are the core and
19 they're supposed to inform you as to the basis of the
20 damages. But when you get to presenting your damages
21 through an expert, their presentation will not be
22 exactly as necessarily explained in allegation in the
23 paragraph (ui). And they asked us and we agreed to
24 supplement our responses, to provide answers to all
25 sub-parts of the interrogatories, including but not

1 limited to each loan, expense, and/or transaction (ui)
2 damages of this action, identifying each document
3 associated with the loans and with each of the
4 transactions, and that we believe we have provided.

5 I guess the last thing I would say is,
6 there's going to be a deposition also of an expert,
7 where they now can spend as much time getting the
8 specificity that they think they may need in addition.
9 When they take that expert's deposition, they will be
10 armed with this particular document.

11 THE COURT: So these are the underlying, I
12 guess -- who created these?

13 MR. SCHAAALMAN: These were also created by
14 the expert, and that's why we waited to get these
15 documents until we knew we had them from the expert.
16 I'll walk you through any questions you might have on
17 (ui). That's a lot to digest and it's very specific.

18 THE COURT: Have you gone through these
19 documents yet?

20 MR. KATZ: I went through them, not in
21 complete detail because they were recently provided and
22 we've had depositions on this case since then. I'll
23 tell you, there's not information, for example, of what
24 account -- if it says Mr. Black paid \$10,000 or
25 \$12,000, I don't see an account number or what account

1 it came from or whether it was his personal account or
2 an estate account or something like that. So the
3 information is very limited.

4 THE COURT: In some of these, they say, Mr.
5 Black's Chase account --

6 MR. KATZ: Okay, some of them.

7 THE COURT: -- Mr. Black's U.S. bank.

8 MR. KATZ: If you look at -- there aren't
9 page numbers on this but --

10 MR. SCHAAALMAN: There are at the top. Each
11 one says 104, 105 --

12 MR. KATZ: Right, but I mean, if I'm
13 pointing to something in the middle of the document --
14 I'm looking on a page that says 1 of 5 for -- what is
15 this, Arden Besunder (ph), for example. There are
16 payments here where it will say, invoice unknown.
17 There might be check numbers but I don't know which
18 account that came from. I don't have that -- all of
19 that information. Why should I have to go look through
20 all of the legal invoices to determine what these
21 monies were used for?

22 For example, if \$600,000 that they're
23 claiming as damages was used based on invoices that are
24 somewhere in their production that relate to monies
25 that Bernard Black used to defend himself on the civil

1 theft claim that he lost, they should identify those
2 for me so that I know, here are monies Bernard Black
3 paid to defend himself on a civil theft claim that he
4 lost. What they're saying is, I have to go through all
5 of the invoices they produced and try to use this
6 document to figure out really what portions of these
7 monies were used for things like that, and I think
8 that's their responsibility and that's why I served the
9 interrogatories to begin with.

10 I mean, this provides some additional
11 information but it does not answer the interrogatories
12 in full by any means that I propounded. Again, this
13 information is coming from their expert. I served
14 interrogatories that are supposed to be responded to on
15 behalf of his clients. This is just a document --

16 THE COURT: Yeah, but when you're asking for
17 information on damages --

18 MR. KATZ: Well, a lot of this --

19 THE COURT: Depending on how it is, the
20 expert might be the more intelligent person to give you
21 the answer.

22 MR. KATZ: Well, the problem is the expert
23 is relying on factual information that Bernard Black
24 has purportedly provided to them. That's the problem.
25 The expert -- they don't have personal knowledge as to

1 what exactly these funds were used for or how Mr. Black
2 wants to allocate the funds.

3 THE COURT: Okay, but, again, you can
4 dispute any of these factual things.

5 MR. KATZ: But I don't even have the factual
6 information to dispute. That's the problem. And I
7 shouldn't have to go through every invoice and try to
8 match it up with the spreadsheet to try and figure out
9 what monies were used to defend a civil theft claim
10 that he lost and an appeal that he lost, and actions he
11 took against Joanne Black that were unsuccessful. They
12 should identify -- we used this money on Bernard
13 Black's civil theft claim, okay, here's the invoices
14 for that, okay? And then if they use invoices for
15 other things, they can list that out invoice by
16 invoice. I don't see why that's unreasonable to ask.
17 What they're trying to do is make a very vague and
18 unintelligible set of documents that are very hard for
19 us to determine what exactly they're claiming. That's,
20 in my view --

21 THE COURT: Doesn't this first page show --

22 MR. KATZ: So these are collective figures.

23 THE COURT: Okay.

24 MR. KATZ: This just shows me there could
25 have been -- I don't know how many invoices -- the SNT

1 here, what does that mean? He's got a number of
2 \$523,067.00. Where does that come from? It's very
3 confusing and what I'm asking them to do is certainly
4 possible to do.

5 THE COURT: So how are these separated out?
6 You've got the collective figures here so at some
7 point, the expert must have separated out which
8 invoices go with which transactions.

9 MR. SCHAAALMAN: Yes.

10 THE COURT: Is that --

11 MR. SCHAAALMAN: That's in what you're
12 looking at, your Honor. If you wanted to take a page
13 -- I'm looking at (ui) scroll back on to that --

14 UNIDENTIFIED SPEAKER: Judge, I don't want
15 to interrupt but Tony Dain just let me know that he got
16 disconnected. Sorry.

17 THE COURT: Here, let me --

18 UNIDENTIFIED SPEAKER: I wrote his number
19 down.

20 THE COURT: Is it (619) --

21 UNIDENTIFIED SPEAKER: Yeah, 818 --

22 (The Court is calling Mr. Dain.)

23 MR. DAIN: Good afternoon. Sorry, I got
24 disconnected.

25 THE COURT: Sorry about that.

1 MR. DAIN: I'll put it on mute again, thank
2 you.

3 THE COURT: Okay.

4 MR. SCHAAALMAN: I guess what I'm saying,
5 your Honor, is the first page of this document, which
6 is basically the general schedule which comes from the
7 expert report, all of the documents that follow support
8 the detail for each one of those columns by legal
9 vendor.

10 THE COURT: Okay, but --

11 MR. SCHAAALMAN: So if you look at -- I'm
12 sorry, I didn't mean to --

13 THE COURT: No, that's all right.

14 MR. SCHAAALMAN: So if you look at the next
15 page, this is from Ms. Abraham. She's the next --
16 alphabetically, she's the first legal vendor. So it
17 gives the date of the invoice, the amount of the
18 invoice, the date paid by Mr. Black, the amount paid by
19 Mr. Black, the check number for that payment, and
20 that's done for each and every invoice for each lawyer.

21 THE COURT: But not which case or what it
22 was used for. The only way to determine that would be
23 to go back to the actual invoice and figure it out. In
24 other words, you or the expert divided this up by legal
25 representative as opposed to say dividing it up by

1 money spent on particular cases.

2 MR. SCHAAALMAN: First of all, the invoices
3 themselves indicate it on the invoice.

4 THE COURT: Yes.

5 MR. SCHAAALMAN: Which case the --

6 THE COURT: What I'm saying is, the only way
7 to actually separate it out would be to actually go in
8 and look up each individual invoice.

9 MR. SCHAAALMAN: Yes, the invoices are the
10 places where this is specifically listed, that's
11 correct, and I think that's as easily available to the
12 defendants as it would be to the plaintiffs. I don't
13 believe we have to present it in a separate chart or
14 add to the chart for that. What we've done is actually
15 done a lot of the work for them by indicating to which
16 -- if you look at the summary page, it certainly talks
17 about for example the Dain case. It's on the first
18 page. That's all the attorneys' fees by loan and by
19 payments, by spending.

20 And the Wrigley Pinto (ph) case, which is
21 (ui) is also listed on that. So it would not be hard
22 at all to go to the 7,000 pages of invoices which we
23 provided and look to see what was actually being spent
24 by which law firm on each case. I frankly think the
25 invoices themselves probably would have been enough to

1 answer the interrogatories. We state the purpose of
2 the legal fees, who's performing the legal (ui), which
3 case the legal fees are for, and how much the legal
4 fees are. I'd also like to just add that there are no
5 efforts -- I think Mr. Katz knows this -- to collect
6 any of the legal fees with regard to the (ui) civil
7 theft case. That's not part of this case.

8 MR. KATZ: I don't know that. I mean, I
9 don't have enough information to confirm that. So
10 you're saying where it says SNT including Colorado
11 appeal, and it's not a number of \$523,067.00, you're
12 representing that includes no monies whatsoever that
13 were either spent on Bernard Black's defense of the
14 civil theft claim or any of the appeals associated with
15 that? Are you representing that?

16 MR. SCHAAALMAN: My understanding is that it
17 had nothing to do specifically with the civil theft
18 case or other appeals to Colorado, but I would have to
19 double-check.

20 THE COURT: What does SNT stand for?

21 MR. KATZ: Exactly.

22 MR. SCHAAALMAN: Supplemental needs trust.
23 The beneficiaries of that issue trust and the
24 supplemental needs trust, trustees basically --
25 trustees are not involved in this case. The

1 beneficiaries, contingent beneficiaries of the SNT are
2 involved in this case.

3 THE COURT: It seems like all the
4 information is there. It might not be in the format
5 that you want it.

6 MR. KATZ: Your Honor, plaintiffs' counsel
7 couldn't even just confirm whether or not the \$523,000
8 figure includes the amounts that were incurred to
9 defend Bernard Black on the civil theft claim. I think
10 that shows you how confusing the information is in the
11 format they provided it. I mean, in order --

12 THE COURT: Well --

13 MR. KATZ: In order for us to try to figure
14 out exactly what they've done here, we would have to
15 spend countless hours reviewing the 7,000 pages and try
16 to formulate our own, you know, guesswork as to what
17 they've done. Their expert say this, your Honor, in
18 their report: They said, "We relied for this
19 allocation" -- and they're talking about the report
20 itself -- "on a combination of information contained in
21 the litigation bills themselves, allocation information
22 provided by counsel at our and Mr. Black's request, and
23 Mr. Black's own allocations."

24 So their analysis is in part based on
25 information that counsel and Mr. Black provided the

1 expert. We don't have that information. So it's very
2 difficult for us to evaluate the --

3 THE COURT: What does that mean?

4 MR. KATZ: It means --

5 THE COURT: Most experts' opinions are based
6 on information provided by people. When you say the
7 allocation -- I mean I guess I don't understand what
8 that means so maybe a clarification needs to be asked
9 to the expert as to what exactly that means.

10 MR. SCHAAALMAN: In fact, Mr. Black is being
11 deposed tomorrow, and I'm assuming -- I'm quite certain
12 that a lot of these damage questions will be asked of
13 him by Mr. Katz. I would assume he can explain better
14 than I can the issue of allocations. I don't
15 necessarily agree that the allocations amount to a
16 document.

17 THE COURT: Does that mean allocation of a
18 particular expense to a particular category? What does
19 that mean exactly?

20 MR. SCHAAALMAN: I believe what was attempted
21 to be done here was to allocate, first and foremost,
22 whether the expense was an expense of the SNT, the
23 supplemental needs trust, or (ui). That's the last
24 column here (ui). I'm quite certain that was the input
25 that Mr. Black provided, which trust (ui). The expert

1 I don't think had that information.

2 THE COURT: Fair.

3 MR. KATZ: And that's part of the
4 information we've asked for in the interrogatories, why
5 they're claiming that these expenses should be paid by
6 the trusts, which is what these allocations purport to
7 represent.

8 THE COURT: I see, so --

9 MR. KATZ: And how would I know that?

10 THE COURT: I mean, I think you've got to
11 ask Mr. Black.

12 MR. KATZ: I mean, your Honor, we can ask
13 Mr. Black but to go through this document -- they said
14 it's a 500-page document. I didn't count the pages. I
15 mean, I don't even know if I'd get through this in
16 seven hours. I think Mr. Black's deposition is going
17 to have to be longer than seven hours just given all of
18 the parties here. Again, I think the plaintiffs are
19 pursuing this case and they should be required to
20 provide us with this information so that we can contest
21 it. I don't think we should have to spend our seven
22 hours --

23 THE COURT: I think that what you're asking
24 for is more of a legal theory. Why are they saying
25 that these particular expenses should be paid for the

1 issues trust or the SNT trust?

2 MR. KATZ: Part of it is just asking factual
3 information, where the money came from, what it was
4 used for, because that issue of what it was used for --
5 for example, the Denver probate court determined that
6 Mr. Black can't seen certain reimbursement for
7 expenses. So depending on exactly what certain funds
8 were used for, they're just out. I mean, he can't
9 possibly seek anything relating to that. Judge Amon
10 has already ruled that if they're expenses that Mr.
11 Black has incurred, they're out of the case. So
12 without detailed information about exactly where the
13 money came from, what it specifically was used for,
14 it's prejudicing our ability --

15 THE COURT: I think -- I think the
16 information is all there, it's just not all in one
17 place. In other words, this lists where the money came
18 from. The invoice should list what it was for.

19 MR. KATZ: I mean, your Honor, I think the
20 problem is, in order for us to even go down that road,
21 that requires the defendants to review all 7,000 pages
22 of invoices and try to extrapolate information from
23 that and compare it to this document, which I think is
24 a complete burden on defendants. Besides time and
25 money, it would be more appropriate for the plaintiffs

1 who are pursuing this case to have to do that. I think
2 this is purposely being provided in a way that it's
3 difficult to extrapolate the information to contest
4 this document.

5 MR. SCHAALMAN: I believe that under the
6 rules, we could have answered these interrogatories
7 simply with documents if the documents actually were
8 (ui) to the questions he asked in the interrogatories.
9 Certainly the legal invoices are in and of themselves
10 answering many of the interrogatory questions.

11 THE COURT: It's complicated, which is the
12 whole reason why they had an expert go through all of
13 this stuff and come up with a report.

14 MR. KATZ: But the expert is not providing
15 any information about what -- how the allocations work
16 or what money relates to the civil theft claim versus
17 not relates to that. The expert is not doing anything
18 of that nature. That's why plaintiffs' counsel can't
19 even confirm right here whether the \$523,067 includes
20 any of that. I mean, that's the problem. There's
21 factual information that's not in here that is
22 important for us to have to defend the claim.

23 MR. SCHAALMAN: All of that information is
24 in the invoices. The invoices indicate the kind of
25 work that was done in the case and that the work was

1 done (ui).

2 THE COURT: Have you looked at the invoices?
3 Do they have that information?

4 MR. KATZ: Some of the invoices are
5 partially redacted. I have not looked at every single
6 invoice so I can't represent with specificity what's on
7 each one of them.

8 THE COURT: Because, look, the way you
9 phrased your question, I think they provided you with
10 the information. It might not be in the format you
11 want it but it's there. If you have more specific
12 questions you want to ask, like for example, you can
13 ask, are any of these expenses from the civil theft
14 suit? They will have to tell you if it is or not.

15 MR. KATZ: I don't --

16 THE COURT: I mean, there are certain
17 categories of damages that you think should be excluded
18 because of that reason.

19 MR. KATZ: I don't think the legal invoices
20 provide the information precisely as to what accounts
21 all the monies came from and whether they were paid
22 from personal accounts as opposed to some kind of other
23 account. I don't think that -- that information, I
24 don't believe --

25 THE COURT: I thought that's the information

1 that's on this. It says where the money is coming
2 from.

3 MR. KATZ: I mean, it just --

4 THE COURT: Whether it's from Bernard
5 Black's -- like the money is coming from, you know,
6 which loan it's coming from or if it's coming from
7 Bernard Black's Chase account or Bernard Black's --

8 MR. KATZ: I guess I would just ask for a
9 representation from counsel then. If it says on here,
10 date paid per Mr. Black, and it has a check number, can
11 you represent that that's his personal account?

12 MR. SCHAALMAN: I can certainly represent
13 that he paid it. I can't tell you as I'm standing here
14 now which account it was but I think that's a fair and
15 easy question for you to ask Mr. Black tomorrow.

16 MR. KATZ: So I have to ask him for every
17 single check that's listed here, what account that came
18 from tomorrow?

19 MR. SCHAALMAN: I suspect if you asked him
20 the sources of the monies that he used to pay these
21 legal bills, you'll find he will identify the account
22 or accounts if there are several. We have the check
23 numbers even in here. I'm sure he'll be able to let
24 you know which accounts he uses.

25 MR. KATZ: Did you produce the checks?

1 MR. SCHAAALMAN: I don't believe we produced
2 the checks.

3 MR. KATZ: We requested all documentation
4 relating to the alleged damages, so why haven't those
5 been provided?

6 MR. SCHAAALMAN: I think we provided
7 sufficient answers to your interrogatories and provided
8 sufficient documentation to answer all the
9 interrogatory questions.

10 MR. KATZ: I mean, I don't think they've
11 been answered. I think what you're saying is, I can
12 question Mr. Black and try to obtain additional --

13 MR. SCHAAALMAN: That's not what I'm saying,
14 that's not what I'm saying.

15 MR. KATZ: I think the checks should have
16 been provided already and if they haven't been,
17 definitely should be produced, at a minimum. I mean,
18 they're alleging more than -- they're alleging over
19 four million dollars in this case. I don't think
20 it's --

21 THE COURT: The checks are certainly
22 evidence. I mean, if these are monies that were paid
23 by check and you're alleging that they need to be
24 reimbursed as damages, then I do think the checks are
25 relevant documents to your damage claim and should have

1 been produced.

2 MR. SCHAAALMAN: If that's the Court's
3 decision, we'll do it.

4 MR. KATZ: Your Honor, there are also
5 instances where, instead of a check, they paid by wire,
6 and there's just no -- there's no designated account
7 number, so I'm not even sure how we would be able to
8 identify the source of those funds. I guess to the
9 extent that there's wire information, I would request
10 that that be provided as well.

11 THE COURT: I assume the bank has records of
12 wire transfers the same way they have records of
13 checks.

14 MR. SCHAAALMAN: I would assume so, your
15 Honor.

16 THE COURT: I mean, it doesn't list the
17 account numbers but I think it does identify the
18 account, and you can certainly ask Mr. Black, what's
19 your Chase bank account number, and you can get those
20 records.

21 MR. KATZ: But they don't all say Chase
22 like --

23 THE COURT: No, but --

24 MR. KATZ: Some of them just say, paid by
25 Mr. Black, and then it has a check number. I mean,

1 yeah, sure, I can ask him tomorrow and he might say, I
2 don't know. I mean, either way, I think we are
3 entitled to the checks.

4 THE COURT: You're going to get the checks.

5 MR. KATZ: Okay, all right.

6 THE COURT: I've already said that they've
7 got to produce the checks.

8 MR. KATZ: Thank you, your Honor.

9 THE COURT: And to the extent you have wire
10 documents, you need to turn them over.

11 MR. SCHAAALMAN: Yes, sir.

12 THE COURT: Look, I think the information is
13 all there. It might not be sufficient for them to
14 prove damages and you can certainly argue that it's
15 not. And if there are clarifying questions you want to
16 ask about any of this, you can ask Mr. Black or you
17 could ask the expert, but I think all of the
18 information that you need is contained in what's been
19 turned over. If there's additional clarification you
20 need, you can certainly ask those questions. But I do
21 think they get the checks and the wire transfer
22 documents.

23 MR. KATZ: Thank you, your Honor.

24 THE COURT: So we're dealing with the
25 privileged documents. I guess there are different

1 categories of issues here. There are some where there
2 are clearly privilege logs provided and you're
3 essentially claiming that the documents were improperly
4 withheld because they were over --

5 MS. ABRAHAM: Yes.

6 THE COURT: -- you know, the assertion of
7 privilege was over-broad. There are other instances
8 where you're claiming no documents or log was provided.
9 But clearly, there were -- the allegation is that there
10 were documents that should have been provided or a log
11 should have been provided, so let's deal with that
12 second category first. In particular, I think your
13 suggestion that Mr. Dain should have produced documents
14 or at least a log for stuff that was being withheld as
15 privileged --

16 MS. ABRAHAM: Mr. Dain did produce some
17 documents. He produced roughly 113 pages of documents.
18 But as both codefendants' privilege logs reveal, he was
19 part of hundreds or thousands of communications that
20 were responsive to plaintiffs' requests, as well as in
21 another proceeding, his firm produced a privilege log
22 of his emails and his communications, which revealed
23 additional communications that were not produced and
24 not logged, that were directly responsive to
25 plaintiffs' requests just on their face. We don't know

1 how many more logged entries were responsive that just
2 don't have enough detail to tell us.

3 THE COURT: Okay.

4 MS. ABRAHAM: Additionally, Ms. Wrigley has
5 produced no documents at all and no privilege log, and
6 she as well appears on hundreds or thousands of
7 communications in the codefendants' privilege logs, and
8 there has been no explanation for why she has no
9 documents.

10 MR. MANCILLA: There is nothing responsive.
11 Can you point to one entry on the privilege log, one
12 out of the thousand, that's responsive to the requests
13 in this case, the first set of requests?

14 MS. ABRAHAM: Yeah, I can -- I don't have
15 the privilege logs with me right now but --

16 MR. MANCILLA: Your requests were very
17 tailored, very tailored, very specific.

18 THE COURT: That's why I asked you, because
19 the defendants are saying they didn't withhold anything
20 for privilege.

21 MR. MANCILLA: We didn't. I think we
22 attached as an exhibit to our response -- there were
23 six requests -- again, we're talking about the first
24 set -- that were specifically tailored mostly to
25 inquiries regarding an investigation of Esaun Pinto.

1 She doesn't have any of that.

2 MS. ABRAHAM: Our requests to defendants
3 were somewhat redundant from defendant to defendant,
4 and her codefendants thought that all these other
5 documents were responsive and put these documents on
6 their privilege logs.

7 MR. DAIN: Your Honor --

8 THE COURT: That doesn't make them right.

9 MR. DAIN: Your Honor, plaintiffs just state
10 in a vacuum that there are thousands of documents
11 responsive but we provided the requests. In fact, I
12 provided the requests and the subpoena that was to my
13 firm, and they're miles apart. Their requests were
14 very specific and use very loaded terms. And as
15 counsel just said, for instance, all documents that
16 evidence your investigation of the theft or whatever,
17 of the taking of monies from the supplemental needs
18 trust by Ms. Wrigley and Mr. Pinto. One, there weren't
19 any monies taken. Two, there was no investigation
20 conducted, so I have no documents. There's nothing to
21 withhold, there's nothing to produce.

22 Most of them -- there were only I think in
23 ours -- I don't have them right in front of me but,
24 again, most of them, there were no documents that were
25 responsive. But ones where there were documents

1 responsive, we provided them. There was nothing
2 privileged, nothing to withhold. So they just keep
3 making these bold statements that these documents
4 should be responsive, and they use as an example the
5 subpoena to Procopio, which if you go through those
6 requests, they're voluminous and they're incredibly
7 broad, so you're going to have a different response to
8 that subpoena, the firm is, than I had to their
9 requests, and that's why he provided those, but they
10 have no specificity. The only examples they provided,
11 the documents were not responsive to their requests,
12 and they were both post-litigation by a year and a half
13 or two years. So we've given them everything that was
14 in the requests, we withheld nothing.

15 THE COURT: Okay.

16 MR. KATZ: Your Honor, I recall -- the
17 requests to Salzman were different. They asked for
18 communications, specifically requested communications
19 with various people.

20 THE COURT: Yeah.

21 MR. KATZ: So that's why we produced
22 documents but we also produced privilege logs. I don't
23 recall with specificity what was requested from other
24 defendants but I remember them not being the same.

25 THE COURT: The ones to Mr. Dain at least

1 are highly specific.

2 MS. ABRAHAM: And plaintiffs are not
3 claiming that the entire 7,000-plus-entry privilege
4 log from Procopio was responsive to plaintiffs'
5 requests. But there are certain entries that, as I
6 said, on their face are responsive, and there are other
7 entries that likely are responsive if more information
8 were provided.

9 MR. MANCILLA: I doubt that.

10 MR. DAIN: But, your Honor, one, they didn't
11 state which -- they give you no examples so there's
12 nothing for me to respond to and say --

13 THE COURT: There's no way for me to
14 actually make any decision based on that argument on
15 either side because I'm not reading through 7,000
16 emails. So if there's a specific document you think
17 should have been provided and they haven't provided it,
18 tell me what it is.

19 MS. ABRAHAM: We did give examples in our
20 motion. Mr. Dain has several communications with Chase
21 that are in the Procopio privilege log and we did
22 specifically ask for those in the document requests.

23 MR. DAIN: Your Honor, I explained that they
24 asked for -- you did mention that they were very
25 specific. They asked for all documents I produced to

1 Chase. The one example they gave was a letter that
2 Chase sent to Mr. Schaalman and to my counsel in
3 Chicago, so it was from Chase. There was no need for
4 me to produce that back; they already have it. There
5 was nothing privileged about it so it wouldn't have
6 been on a privilege log, and it was post-litigation.
7 It was discussing a FIMRA (ph) arbitration award that
8 happened a year and a half after they instituted the
9 lawsuit and is unrelated.

10 So yeah, of course, you can't go through all
11 7,000 but that's in another privilege log anyway. Your
12 Honor, I can tell why you're saying they're specific.
13 If you go through the requests, they are very specific
14 so are there hundreds, thousands? No, there aren't
15 even tens or one. I went through it again just in case
16 and there's nothing more I can produce.

17 THE COURT: That's not a good example for
18 you.

19 MS. ABRAHAM: As we also noted in our
20 motion, in that privilege log, there's an identical --
21 in all 7,000-plus entries has an identical description.
22 So as I said, there are several more entries that, if
23 actual information were provided as opposed to the
24 boiler plate privilege claims and boiler plate
25 explanation of what the document is, it would give us

1 more information to know what other documents are
2 responsive to our requests.

3 MR. DAIN: That is in a privilege log in
4 another case and I had provided the example where
5 they're going back and forth. Counsel for Procopio
6 amended his privilege log per their discussions and
7 sent a letter back explaining why their privilege log
8 is complete. That happens in the normal course and
9 it's the appropriate thing to do. But, your Honor, you
10 can't in this case address what they haven't done in
11 the other case, which is -- well, hopefully, they have
12 by now -- complete their meet and confer and their
13 attempt to resolve any issues they have over that
14 privilege log. That's not in this case. The question
15 is just, should we have provided a privilege log
16 because we withheld documents. We did not. Should
17 there be more documents we should have produced, there
18 are not.

19 MS. ABRAHAM: And there are -- Mr. Dain said
20 that the document we identified in our motion was an
21 email to him. There are in his privilege log
22 additional entries from him to Chase, so it's not --

23 THE COURT: Yeah, but that's not what you
24 asked for. You asked for documents that he produced to
25 Chase.

1 MS. ABRAHAM: Right, and the email would be
2 the document.

3 THE COURT: The email is not a document.
4 You didn't ask for communications between him and
5 Chase. You asked for documents he produced to Chase.
6 If you had intended that to include communications he
7 sent to Chase, then you should have asked for that
8 because I don't think any plain reading of that would
9 suggest that that's what you meant.

10 MS. ABRAHAM: I believe that that was in our
11 definitions.

12 MR. DAIN: (Ui) the case is there are some
13 emails you think are responsive, please identify them.
14 If you tell me what it is -- again, I would have to go
15 looking through that. I know they have -- whatever
16 they have, they have, because they've been seeking this
17 in multiple litigations all involving Mr. Black, so
18 there's no reason for me to withhold anything. It
19 would be very simple. So I'd go above and beyond if
20 they're claiming there's something they truly don't
21 have. But I read their interrogatory, I've looked at
22 what they wanted, I produced what they wanted. If
23 there's something more -- that's something you normally
24 do in give-and-take.

25 But remember, your Honor, this was the first

1 production and we had already addressed that. We went
2 through that motion and your Honor said their only
3 further discovery is to deal with the second request
4 for interrogatories production, which had to be
5 severely narrowed. That was your order -- and the
6 depositions. And now they're trying to go back to the
7 beginning because they had a privilege log in another
8 case, and comparing apples and oranges. I of course
9 agree that I shouldn't have to produce anything more
10 but we're way post when they should have brought this
11 issue up. But, again, if they can point to anything
12 specific, you know, for what it's worth, if it's not
13 unreasonable, I would work with them, but they didn't.
14 I mean, the time was when they brought the motion, not
15 now.

16 THE COURT: Do you have any other instances
17 where you asked for something that you think was not
18 provided for Mr. Dain. Put aside the other defendants
19 because they're each -- their requests are different.

20 MS. ABRAHAM: Right. As we indicated, the
21 only thing that we know from his firm's privilege log
22 are the participants in the communications. There's no
23 other information.

24 THE COURT: Okay.

25 MS. ABRAHAM: We believe that there are

1 additional documents in there that are responsive but
2 without information, we can't identify the specific
3 ones.

4 THE COURT: Okay. Why do you believe there
5 are other responsive documents?

6 MS. ABRAHAM: As we indicated, there are
7 some that are obvious, we believe, and --

8 THE COURT: Like what?

9 MS. ABRAHAM: Well, as we said, we believe
10 that the communications with Chase are responsive, and
11 just --

12 THE COURT: They're not.

13 MS. ABRAHAM: You know, in terms of
14 documents, a document per the local rules include
15 electronically stored information, and that would --

16 THE COURT: I'm sorry but I can't agree with
17 that. If you ask somebody to give me -- give me all
18 documents you produced to somebody else, I don't see
19 any possible way that somebody is going to construe
20 that to mean emails that you sent to somebody else.

21 MS. ABRAHAM: Okay.

22 THE COURT: It just doesn't make sense. I
23 understand that might be what you intended but that's
24 just not a fair reading of that. Putting aside the
25 Chase emails, what else do you think you asked for that

1 he's improperly withholding?

2 MS. ABRAHAM: As we indicated, from this
3 information, we can't tell with specificity what there
4 is. We also for instance can't tell from this --
5 within the Chase emails, we can't tell what had
6 attachments, which then would be unquestionably
7 documents.

8 THE COURT: Yeah, I suppose if he sends an
9 email to Chase with documents attached, that would be
10 responsive.

11 MS. ABRAHAM: Yes.

12 THE COURT: But I don't know whether he did
13 or not.

14 MR. DAIN: Your Honor, everything I would
15 have sent to Chase would have been through email, so I
16 would have -- you know, I wouldn't probably have sent
17 anything through snail mail. But if that's their
18 request, I have no reason to withhold anything. So
19 I'll tell you -- let's agree to that. I will go back
20 and look at all my emails to Chase or Chase's counsel
21 and see if there are any documents or attachments that
22 I haven't produced, which I don't believe there are.
23 But if there are, I'll produce them.

24 THE COURT: So what else besides the Chase
25 stuff?

1 MR. DAIN: Your Honor, while she's doing
2 that, could I make a request that they -- if they can
3 identify for me those emails that they're saying I had
4 attachments to, that would make it a lot easier because
5 they're --

6 THE COURT: I think she said she wasn't able
7 to tell which ones had attachments or not from the
8 privilege log.

9 MS. ABRAHAM: That's correct.

10 MR. DAIN: Oh, no, I just meant if she could
11 identify any emails that are to Chase. Just identify
12 them to me because otherwise, I have to go to
13 Procopio's general counsel, ask her to get our attorney
14 to look for those, and that's a cost to the firm. I'd
15 rather just incur it myself. There really is a cost to
16 the firm because they have an attorney they've assigned
17 to responding to that subpoena. So I'd rather do that
18 than have Procopio's attorney do it because it's my
19 responsibility. But I think it's up to plaintiff to
20 say, here are the emails that are to Chase that we
21 believe would have documents. I bet if they look at
22 them, they will see that whatever documents might have
23 been there were produced because, again, I would have
24 produced them by email.

25 MS. ABRAHAM: We also believe that there are

1 likely documents on there that reflect actions that Mr.
2 Dain took as trustee in the administration -- as
3 trustee of the SNT and the issue trust, which was
4 requested.

5 MR. DAIN: Your Honor, they requested for a
6 specific time period and that time period was before --
7 was while only Bernard Black was on the account, so I
8 had nothing to administer. He not made me aware he had
9 yet transferred any funds, so I did produce everything.
10 They're saying that they believe -- again, if they can
11 sell me anything more than saying it's incomplete, I'll
12 work with them.

13 But just to make this statement, we believe,
14 it just -- it's like a statement we don't trust --
15 well, tell me. Tell me why, you know, why you believe,
16 what you think I haven't presented. The period they're
17 talking about was before all of the actions blew up
18 into this litigation, and there was very little that
19 was going on before that time so I believe I produced
20 everything. Again, let them be specific and not just
21 make these comments.

22 THE COURT: What if any actions do you think
23 Mr. Dain took during that time that would have -- there
24 would be documents about?

25 MS. ABRAHAM: Well, that's why we requested

1 the documents.

2 THE COURT: I know, but he said he didn't do
3 anything so -- I mean, it sounds to me like you just
4 don't believe him but there's nothing I can do about
5 that.

6 MR. MANCILLA: Their complaint is replete
7 with allegations that during that specific time period,
8 Mr. Dain did nothing. That's actually one of their
9 arguments in support of their claims is, during that
10 specific time period, he did nothing.

11 THE COURT: It sounds like that part of the
12 complaint might be true.

13 MR. MANCILLA: There you go.

14 THE COURT: Look, if there's something
15 specific that you think is missing, tell me and I'll
16 make them produce it. I mean, this speculation that
17 there's stuff out there, he's represented that there
18 isn't. I don't know what I'm supposed to do with that.

19 MS. ABRAHAM: I mean, we would just ask that
20 Mr. Dain make -- just take a closer look at the
21 documents that his firm located, that there are no
22 additional responsive documents to plaintiffs' document
23 requests because at the time we received his 113 total
24 pages of responsive documents, we obviously didn't know
25 there were additional -- at least 7,000 additional

1 documents that were unaccounted for that were not
2 identified.

3 MR. DAIN: Your Honor, that's a very clever
4 way of turning their, you know, insufficient request
5 into making it look as though there were some more
6 documents I should have produced. Their requests were
7 what they were and that's on them, and I produced
8 those. To make me go back and take another look just
9 because they're saying -- I guess they're conceding
10 that they're just saying, we don't trust you. Well, I
11 did produce some documents, don't get me wrong. It's
12 not that there were zero. They just said it was a
13 hundred and some. But to say now, go back and do a
14 second look -- tell me where you think there's more?
15 If you're saying that Bernard has an email from me or
16 some documents I sent that you want to confirm that I
17 also have, I'll be happy to look for them.

18 I have no reason to withhold anything.
19 There's so much litigation. We've been responsive in
20 multiple subpoenas, multiple requests to produce. But
21 just to make a statement, go through it again, you have
22 to accept that I didn't do the job twice so far. I've
23 looked twice -- well, I looked multiple times but again
24 after their motion, I went back and looked and that's
25 not fair. They need to be specific and not just this

1 kind of general distrust and, we just believe there's
2 something out there. That's not fair.

3 THE COURT: Look, unless you can point to
4 something specific that you think is being improperly
5 withheld -- I mean, he's told you that he doesn't have
6 any responsive documents. I'm not sure what else --

7 MR. DAIN: And I don't want it to be a trap.
8 That's why I'm saying I'll work with them.

9 THE COURT: The few examples that you've
10 provided I don't think were responsive or, you know, he
11 has an explanation for why he doesn't have documents
12 that are responsive. If there's something specific,
13 ask him about it but --

14 MS. ABRAHAM: I mean, we simply don't have
15 enough information from the privilege logs, you know.

16 THE COURT: And you also don't have enough
17 information to say that he hasn't produced something.
18 You can't have it both ways. Look, the legal system
19 requires a small amount of trust on both sides. When
20 you make a request, the other side has a responsibility
21 -- certainly Mr. Dain is pro se but he's still an
22 attorney and an officer of the Court. He has a
23 responsibility to, you know, comply with valid
24 discovery requests. But it's not enough to just say,
25 we think there might be more out there. He says there

1 isn't. Unless you can give me some reason to doubt
2 that, I have to take him at his word.

3 MR. DAIN: Your Honor, I interrupted you but
4 I meant to say I don't want this to be a trap, either.
5 If they really believe -- they have some reason to
6 believe there's something out there. For instance, if
7 they have some document that indicates I have another
8 document, I'll work with them. I just don't want it to
9 be a go-fish, where I continuously have to go back on
10 pins and needles and try to make sure, is there
11 anything I can read into this that could be responsive?

12 If they have nothing, like if they don't
13 have any other document that indicates it, then there's
14 nothing I can do. I in good faith went through
15 everything multiple times. So I want to make that
16 clear, that I want to work with them. I just don't
17 think there could be anything else but anything they
18 can point me to, you know -- I don't want it to be a
19 trap. I'll produce it to them. But I'm not getting
20 that and I don't think you are, either.

21 MS. ABRAHAM: We will be happy to take Mr.
22 Dain up on his offer to work with us and provide him
23 with more specific examples and information.

24 THE COURT: Okay. If there's something
25 specific, ask him about it. If he refuses to produce

1 it, then we can talk about it. But as it is right now,
2 I don't see anything that he should have done
3 differently.

4 What about -- do you have the same issue
5 with Wrigley and Pinto? Did they produce logs or no?

6 MS. ABRAHAM: They produced no privilege
7 logs. Mr. Pinto did produce some documents, Ms.
8 Wrigley produced no documents. However, they both, in
9 response to the document requests, made several
10 privilege objections. They now say there were no
11 documents so the basis for the privilege objections are
12 a little curious. You know, I'm not sure what
13 privilege they were protecting if there were no
14 documents in their responses.

15 MR. FANTONE: Judge, the only responses that
16 include, admittedly, somewhat boiler-plate references
17 to privilege --

18 THE COURT: See, this is why you shouldn't
19 be doing boiler-plate objections.

20 MR. FANTONE: Fair enough, but they certify
21 that there are no documents, okay? Maybe it's there
22 because in the event that something is subsequently
23 found, I wouldn't want to waive any privilege argument,
24 and the question itself may indicate privilege on the
25 face of it, but it's very clear -- I'm looking at what

1 was attached as Exhibit A. That's document 19710
2 attached to our opposition. I'm on ECF page 506.

3 So response 1 does mention attorney/client
4 privilege but certifies not aware of the existence of
5 any responsive documents. That's the same for response
6 3. Either way, response 3, we did produce those
7 documents. That's maybe five or six documents which
8 are actually the core of the allegations in the
9 Northern District of Illinois case. Those are
10 documents that Ms. Wrigley sent to Northwestern as part
11 of her complaint, which formed the basis of Katherine
12 Black's deprivation action. So those documents have
13 been produced in multiple places.

14 THE COURT: Okay, what documents or category
15 of documents did you ask for that you think they should
16 have produced?

17 MS. ABRAHAM: Well, I mean, Mr. Fantone just
18 gave a great example, document request number 3. There
19 are documents there and Ms. Wrigley has produced no
20 documents in this case.

21 MR. FANTONE: We did produce. I
22 specifically emailed those to Mr. Schaalman, even
23 though I told him, you already have these in the other
24 case, do you want me to -- yes, I sent the email.

25 THE COURT: That's for category 3?

1 MR. FANTONE: For category 3. I don't think
2 that's really the issue here. They have those six
3 documents. By the way, is there any claim of privilege
4 in category 3? No, so it's really not even an issue in
5 their entire application. It doesn't say anything
6 about privilege in category 3. The only objection
7 there is that they already have it because of the other
8 lawsuit, so that's not at all even relevant to their
9 application.

10 THE COURT: Okay.

11 MR. FANTONE: Judge, the reason I can
12 confidently say that they can't even give us one
13 example is because just by reading these requests, they
14 don't exist. They're talking about communications --
15 just generally, they're talking about communications
16 between Anthony Dain and Cherie Wrigley relating to
17 this investigation of Esaun Pinto that never happened.
18 That's why I can pretty confidently tell you that none
19 of these exist. They can't give us one example. They
20 can't give us one example, okay? Not that this was a
21 major --

22 THE COURT: So what is your actual answer to
23 that?

24 MR. FANTONE: We don't have any.

25 THE COURT: Did you say, we don't have any

1 documents, we don't have any responsive documents?

2 MR. MANCILLA: None exist.

3 MR. FANTONE: None exist. I mean, yeah,
4 which we said. We said that. Defendant responds that
5 she's not aware of the existence of any responsive
6 documents.

7 THE COURT: Okay.

8 MR. FANTONE: That's it, and now we're
9 facing this motion to compel.

10 THE COURT: So what basis do you have for
11 believing that there are responsive documents that they
12 haven't produced?

13 MS. ABRAHAM: I mean, first off, I would
14 just note that not -- the requests don't necessarily
15 require an investigation. It asks for any
16 communications concerning any of this. Even if it's
17 an, oh, we don't believe this kind of communication,
18 that would be concerning.

19 THE COURT: But that's not --

20 MS. ABRAHAM: But essentially, you know --

21 THE COURT: That might be what you want but
22 that's not what you asked for.

23 MS. ABRAHAM: No, that actually is what we
24 asked for there.

25 MR. FANTONE: Which one are you looking at?

1 MS. ABRAHAM: If you look at request number
2 2, any documents reflecting communications concerning
3 fraud or potential fraud.

4 MR. FANTONE: There are no communications
5 between Cherie Wrigley and Anthony Dain concerning
6 fraud or potential fraud by Esaun Pinto. There is no
7 fraud by Esaun Pinto.

8 MS. ABRAHAM: A communication doesn't
9 necessarily mean what the answer is. There can be no
10 fraud and there can still be a communication about
11 that, so that's not the request.

12 MR. FANTONE: Hold on. There could be no
13 fraud and there still be a conversation about fraud?

14 MS. ABRAHAM: Yes.

15 THE COURT: There could be a conversation
16 about -- look, there was an allegation of fraud.

17 MR. FANTONE: Right.

18 THE COURT: They might not believe it but
19 they could still talk about it.

20 MR. FANTONE: None exist.

21 THE COURT: They didn't have any
22 conversations at all about the allegations of fraud?

23 MR. FANTONE: No.

24 THE COURT: Okay.

25 MR. FANTONE: Not that we're aware of, as

1 has been certified in this response.

2 THE COURT: There's your answer.

3 MR. FANTONE: Judge, this is why we asked
4 for Rule 37 expenses, not that this was a giant task in
5 responding but, frankly, I think that they had some
6 legitimate issue with other defendants and thought, it
7 doesn't take much for them to include a small thing
8 against Ms. Wrigley, Mr. Pinto, and CPI Investigations.
9 And even though it wasn't a lot, we still had to review
10 -- you know, review the application, do a little
11 research, issue a response, and then review the reply.
12 I mean, our appearance here today -- I think we
13 probably would have been here anyway but, you know,
14 these little things add up when we're doing this work
15 involving three cases.

16 MS. ABRAHAM: I would suggest that if the
17 answer was that there were no responsive documents,
18 rather than objecting on the basis of attorney/client
19 privilege, attorney work product doctrine, and the
20 common interest privilege, the proper response is,
21 there are no responsive documents.

22 MR. FANTONE: But then --

23 MS. ABRAHAM: And that would have avoided a
24 lot of confusion.

25 MR. FANTONE: First of all, this is a very

1 common response, so there really shouldn't be any
2 confusion. Second of all, what happens then if
3 subsequently, we find documents?

4 MS. ABRAHAM: Then you supplement your
5 responses.

6 MR. FANTONE: Have we then put ourselves in
7 a position where we've waived the attorney/client
8 privilege because it wasn't indicated in our initial
9 response? So I think it's, you know, our obligation to
10 be cautious in doing so. And by the way, having a
11 conversation about that prior to filing an application
12 is also a way to avoid this situation, which wasn't
13 done. We just received the -- plaintiffs' application.

14 MS. ABRAHAM: Since boiler-plate privilege
15 objections are not effective under the Federal Rules
16 anyway, it's not an abundance of caution.

17 THE COURT: Look, it's a moot point. It's a
18 boiler-plate objection because they can't provide more
19 details since there are no responsive documents.

20 MS. ABRAHAM: Right, which --

21 THE COURT: I don't think you should have
22 put the boiler-plate responses? I think the answer to
23 that question is, there are no responsive documents.
24 You can't assert a prospective privilege for stuff that
25 doesn't exist. If you find stuff later, then you can

1 assert a privilege based on what you find. The bottom
2 line is, there are no responsive documents, so moving
3 on.

4 What about Cohenson?

5 MS. ABRAHAM: Yes. In terms of Ms. Cohenson
6 and Mr. Salzman, they both did produce privilege logs
7 and our issue there is more with the over-expansive and
8 boiler-plate privilege and common interest claims. In
9 general, we think that they have failed to establish
10 any of the required elements. We also think that there
11 are several participants to their alleged common
12 interest that frankly cannot be part of a common
13 interest.

14 One frequent participant based on the
15 privilege logs is Pamela Curr (ph), who they claim a
16 common interest with her both as to the New York
17 guardianship proceeding, which she submitted a
18 declaration in this court saying that she had no
19 involvement in that, that she was not retained for
20 that. In Colorado, where she was retained, she
21 committed to providing information and sharing all
22 communications with Mr. Bernard Black, so there's no
23 common interest there, either. There's just no common
24 interest with somebody who is committed to sharing her
25 communications with everybody. So we think that any

1 communications shared with her were waived or any
2 potential privilege is waived.

3 There's Eve Markovitch (ph), who is the
4 minor plaintiff's guardian in Surrogate's Court. We've
5 heard different stories as to why documents and
6 communications with her have been withheld. The most
7 recent story is that they were going to submit a joint
8 affirmation. That doesn't in and of itself create a
9 privilege when her duty is to represent the minor
10 plaintiff's interest. It's not to represent Mr.
11 Salzman or his interests. Her interests do not align
12 with his and there can be no common interest there.

13 Gail Young in Colorado, it's also been ruled
14 that she doesn't have privilege. She represented
15 herself as the eyes and ears of the court and was
16 ordered to turn over documents in response to a
17 subpoena. Defendants are claiming that they have a
18 common interest with her as well. They have several
19 parties that are frankly -- plaintiffs don't know who
20 they are. No parties in the privilege logs were
21 identified, who they were, what their roles were, just
22 by name. Plaintiffs were able to identify the majority
23 of them but there were additional parties that
24 plaintiffs just can't identify. Over a month ago, in
25 June, defendants were asked to identify these

1 individuals and plaintiffs have received no response,
2 not even just saying who they were, what their role
3 was, what the basis of the common interest with them
4 is.

5 THE COURT: Okay. Let's take them one at a
6 time. So Curr was the accountant, right?

7 MS. ABRAHAM: Yes. She was a forensic
8 accountant in Colorado, who was for the plaintiff.

9 MR. KATZ: Your Honor, if I may respond.

10 THE COURT: Yes.

11 MR. KATZ: I think you wanted to take this
12 one at a time.

13 THE COURT: Yeah, let's talk about her
14 first.

15 MR. KATZ: Sure. So Pamela Curr was
16 retained by Gail Young. Gail Young was the court-
17 appointed guardian ad litem for Joanne Black. So the
18 retention was for Joanne Black. The way that the
19 plaintiffs are trying to characterize her role I think
20 is incorrect. Pam Curr -- I think this is even cited
21 in a footnote in the plaintiffs' papers -- indicated or
22 testified that she was not court-appointed or some kind
23 of neutral. So she was retained on behalf of Joanne
24 Black, as I understand it.

25 In addition, this one communication they're

1 talking about with Bernard Black was in the beginning,
2 I think, of that matter, after she was retained. She
3 goes on to say, after the sentence they cite -- they
4 omit the sentence where she says, if that is not
5 satisfactory, please let me know. Then obviously, she
6 did not disclose the communications to the plaintiffs
7 or to Mr. Black. Otherwise, they wouldn't even be
8 making it an issue on this motion.

9 So in addition, as the Court may know, Ms.
10 Curr has been sued in cases by Mrs. Black. She was
11 named in this case even though she got out on a motion
12 to dismiss. So I think it's clear that she was working
13 with the other individuals to defend against Bernard
14 Black's civil theft. That was a common, limited
15 purpose to address that. I think the common interest
16 doctrine does apply. In addition, work product would
17 protect any communications that she would be on as
18 well.

19 Again, the plaintiffs don't have these
20 communications precisely because Ms. Curr did not
21 provide them to them. So I think it's pretty clear
22 that the communications with her on them is not
23 discoverable. I think Mr. Dain -- I mean, he could
24 probably speak more to the Colorado litigation, since
25 he was involved in it.

1 MS. ABRAHAM: What Mr. Katz did not show is
2 where there's the followup email saying, this is not
3 acceptable. That Ms. Curr didn't follow through on her
4 commitment does not take away that she had committed
5 publicly to sharing all communications with Mr. Black.
6 It also does not give her a role or an interest in the
7 New York guardianship proceeding, which is required for
8 the common interest exception waiver to apply. You
9 need to have a common interest, a common legal
10 interest, and a desire to see one party over another
11 party is not a common legal interest sufficient to
12 satisfy that.

13 MR. KATZ: Work product --

14 MR. DAIN: I'm sorry, I just wanted to add,
15 your Honor, because I was -- this is Anthony Dain
16 again. I was actively involved in the Colorado
17 litigation. Ms. Curr's role was, she was a hired
18 forensic expert by the guardian ad litem, helped
19 uncover Bernard's defalcations, Bernard Black's
20 defalcations. She was involved in the New York
21 guardianship proceedings to counter the accounting by
22 Bernard Black's accountant, who the court in Colorado
23 refused to allow to testify because her accounting was
24 a fictitious accounting. So she was representing
25 Joanne Black's interest. Ira Salzman's interests were

1 aligned.

2 In addition, very early on in Colorado, we
3 were aware of Bernard Black's threat to sue us all
4 because he had initially hired another attorney prior
5 to the ones that represent him now and paid them a
6 retainer. When we discovered the retainer, we inquired
7 and we were told that Bernard Black was going to sue
8 everyone, including Pam Curr, including Gail Young, and
9 he did, including us in the two suits. One of them was
10 filed in 2016, one in March of 2016. But we were aware
11 of much earlier than that, that Bernard Black was
12 threatening to sue everybody who was involved in
13 protecting Joanne Black and uncovering his theft. So
14 we had strategy discussions. We had discussions
15 separate and apart from any discussions with Mr. Black
16 or his counsel.

17 We internally, including Mr. Salzman, Ms.
18 Curr, Ms. Young, and Ms. DiPonio, who was also sued,
19 me, Ms. Wrigley, Esaun Pinto -- all strategy
20 discussions, all the litigations that were subsequently
21 brought, all were interrelated in that sense. So to
22 say that she was a disinterested, appointed party that
23 was merely interested in one side winning is absolutely
24 incorrect. Ms. Curr was part of the team that was
25 developing the strategy to defend Bernard Black's

1 actions.

2 MS. ABRAHAM: I would just like to point out
3 that Ms. Curr's declaration submitted to this Court
4 contradicts what Mr. Dain just said about her
5 involvement in the New York guardianship case. She
6 says very clearly that she was not involved in that
7 case. The full extent of my involvement in the
8 guardianship proceeding was my presence in the
9 courtroom on March 22nd, 2016, is what she puts in her
10 sworn declaration.

11 MR. DAIN: She was arguing about
12 jurisdiction, that they were trying to gain
13 jurisdiction in New York by her appearance as a
14 witness. She was there as a potential witness. That's
15 a different issue than whether she was part of a team
16 that would be protected by a common interest.

17 MS. ABRAHAM: And in arguing against
18 jurisdiction, she said that the full extent of her
19 involvement was her appearance. I mean, her sworn
20 statement doesn't change because of the purpose of it.
21 It still is her sworn statement.

22 MR. DAIN: It's taken out of context, your
23 Honor. She was there as a potential witness. She
24 provided accounting information for Mr. Salzman's use
25 in defending in Joanne against Bernard's guardianship

1 action. Obviously, the court agreed that there was no
2 jurisdiction over her so that was an entirely separate
3 issue. Again, that was in this case, the
4 jurisdictional question.

5 MS. ABRAHAM: Defendants are saying that Ms.
6 Young hired Ms. Curr. As Ms. Young was ordered to turn
7 over documents in response to a subpoena after arguing
8 that she shouldn't have to due to privilege, any
9 privilege that Ms. Curr has would stem from being
10 retained by Ms. Young or from court-appointed. So if
11 Ms. Young doesn't have privilege, she can't extend that
12 to -- she can't extend any privilege to Ms. Curr and
13 her work.

14 MR. DAIN: The documents that Ms. Young was
15 ordered to turn over related to, prior to the common
16 interest, her first meetings with Joanne as guardian ad
17 litem, her first meetings with Bernard and the
18 attorneys. That was prior to the common interest
19 agreement being entered into. That was a different
20 issue. She felt she had a privilege in protecting
21 Joanne Black and the court said no. She had her
22 deposition taken. This was very, very early -- either
23 late in 2014 or early in 2015, and that's a separate
24 issue from her protection of the common interest
25 agreement when she became a potential defendant in this

1 very case.

2 MS. ABRAHAM: Additionally, Ms. Curr
3 testified in deposition that keeping communications
4 confidential was never discussed. There's no common
5 interest without essentially that discussion, that
6 communications between these people will remain
7 confidential. It's an element of privilege, it's an
8 element of common interest. She clearly testified
9 under oath that it was never discussed.

10 MR. DAIN: Ms. Young are you saying?

11 MS. ABRAHAM: Ms. Curr.

12 MR. DAIN: Ms. Curr? Ms. Curr was never
13 deposed.

14 MS. ABRAHAM: Ms. Curr was deposed in
15 another action and the transcript is --

16 MR. DAIN: That's taken out of context
17 again. You're going to need -- Ms. Curr was a
18 participant even in one of the written common interest
19 agreements.

20 Again, your Honor, she's taking statements
21 out of context but if you look at the entire course of
22 conduct, if you look at the entire course of the facts
23 and circumstances, she was part of the team that was
24 protecting Joanne and she was a potential defendant
25 from very early in 2015 at the latest.

1 MS. ABRAHAM: In a deposition in 2018 --
2 it's Exhibit 9 to plaintiffs' motion to compel. Ms.
3 Curr was asked, did Ms. Young tell you that
4 communications that she had with you in which other
5 people were included were confidential? There's a
6 series of objections and then Ms. Curr says no. She
7 then says, my answer is no, and then a followup
8 question: She didn't tell you that they were
9 confidential when other -- in communications which
10 other shared, correct? Answer: It was never
11 discussed. It's hard to take that out of context.

12 MR. DAIN: No, that is a very limited
13 context. That's asking if Ms. Young told her the
14 communications. That doesn't mean they weren't and
15 that doesn't mean that she isn't part of the common
16 interest agreement, and that doesn't mean she doesn't
17 know that there's a common interest agreement in
18 writing at some point that covered nunc pro tunc
19 earlier. It's just asking whether at the time Ms.
20 Young conveyed a particular statement to her, she said,
21 this is confidential.

22 MS. ABRAHAM: It was asked --

23 MR. DAIN: She doesn't have to.

24 MS. ABRAHAM: It was asked --

25 MR. DAIN: She's an attorney -- I'm sorry, I

1 don't mean to interrupt. I apologize. And it's also
2 work product.

3 MS. ABRAHAM: It was asked at the time of
4 the communications if there was a discussion about the
5 communications being confidential, and her response was
6 that it was never discussed. That in 2018 it was
7 discussed does not retroactively create a common
8 interest in 2016 or earlier.

9 MR. KATZ: I think the testimony that
10 counsel just cited just refers to whether she discussed
11 that with Ms. Young.

12 MS. ABRAHAM: Ms. Young, who defendants say
13 retained Ms. Curr.

14 MR. KATZ: It's not asking whether it was
15 discussed with anyone. It's clearly, at a minimum,
16 work product. Again, Ms. Curr did not disclose these
17 communications to plaintiffs. That's why they don't
18 have them over the course of numerous years. So the
19 strategy communications that were had clearly would be
20 work product.

21 MR. DAIN: I would add that in the Chicago
22 litigation, Judge Kanelly (ph), a district court judge,
23 has found that Ms. Curr's documents were covered by the
24 common interest agreement because she was a defendant,
25 irrespective of being an accountant, and she was a

1 prospective defendant. That is in Judge Kanelly's
2 order. So this would be inconsistent, to claim that
3 there it's covered but here, it isn't.

4 MR. FANTONE: In Mr. Salzman's response, his
5 own explanation for work product does not protect these
6 communications. He cited law that says exchange of
7 subpoena among attorneys with identical litigation
8 perspectives doesn't render the information vulnerable
9 to pretrial discovery. These are not communications
10 between attorneys with identical pretrial -- identical
11 litigation perspectives. These are communications with
12 parties who have committed to sharing information.

13 Mr. Katz keeps mentioning how it's obviously
14 work product because the plaintiffs haven't seen these
15 documents. Mr. Katz produced in discovery multiple
16 redacted communications, including in plaintiffs'
17 motion to compel, we produced Exhibits 10 and 11. Mr.
18 Katz produced a fully redacted email chain. Ms.
19 Wrigley in 2015, before defendants came up with the
20 idea of claiming common interest, produced an identical
21 email chain, a slightly longer email chain with no
22 redactions, no privilege objections, no common interest
23 objections.

24 MR. KATZ: Judge --

25 MS. ABRAHAM: If defendants had had a common

1 interest or a privilege claim at some point, that's
2 been waived to these communications, to other
3 communications that have been produced, and to the
4 subject matters.

5 MR. KATZ: Judge, I think there's case law
6 that says one party can't unilaterally waive a
7 privilege that benefits other parties if there's some
8 disclosure by the one party. Obviously, that wasn't
9 done in this case. The case that I'm referring to is
10 21st Century Diamond LLC v. Allfield Trading, 142 A.D.3d
11 913. It's a First Department of New York Appellate
12 Division 2016 case. I don't have any information about
13 this one email that they're referencing or what case it
14 related to, but I think there's New York case law that
15 indicates that that wouldn't mean that the privilege
16 would be waived for parties in this case.

17 MS. ABRAHAM: The privilege that hasn't been
18 established yet.

19 MR. KATZ: We think it clearly has been.

20 THE COURT: When are these communications
21 alleged to have -- the communications that you're
22 asking for with Ms. Curr, what time period are they
23 from?

24 MS. ABRAHAM: Most of them are in 2015.

25 THE COURT: Are you asking for --

1 MS. ABRAHAM: There are some in 2016 but
2 primarily, it appears to be 2015.

3 THE COURT: What was the -- were they all
4 communications or was there a limitation on it?

5 MS. ABRAHAM: We believe that any
6 communication with Pamela Curr concerning the New York
7 guardianship proceeding, in which, as has been stated,
8 she swore that she had no part in, were not subject to
9 common interest. In Colorado, where she committed to
10 sharing all communications with Bernard Black, we
11 believe there's no common interest there. It's worth
12 noting that Ms. Cohenson has testified twice now in two
13 depositions that there was no common interest in 2016.

14 MR. DAIN: That's an incorrect statement,
15 your Honor. Again, that's taken out of context. It
16 was talking about when she believed the common interest
17 agreement was entered into, not that there wasn't one.
18 She's a signatory.

19 THE COURT: The one that you submitted to
20 me, was there --

21 MS. ABRAHAM: She did not sign anything in
22 2016.

23 THE COURT: Was that the -- I have the
24 common interest agreement that the parties submitted.
25 Was that the first written one or was there a prior

1 written agreement?

2 MR. KATZ: That's the --

3 MR. DAIN: Your Honor, there were multiple
4 drafts over the years. It took that long to finally
5 reduce it to writing because there were multiple
6 litigations that kept getting filed, and we had some
7 issues with -- some of the parties were parties in
8 multiple states, and the insurance carriers for
9 instance weren't comfortable with adding a litigation
10 that was handled by maybe another carrier in another
11 state. So we had iterations of that going on and,
12 again, those would have still been covered by an oral
13 common interest agreement.

14 The one you have may be the first one
15 reduced to writing that would involve this case. There
16 are others that were involving other cases as well
17 because we had to have one that was kind of an umbrella
18 and others that were partial to one or more cases.
19 That may be the first one that was fully executed.

20 MS. ABRAHAM: I would say that Ms. Cohenson
21 as recently as 2018 testified that she didn't know what
22 common interest was. So for Mr. Dain to say that she
23 was previously part of a common interest agreement and
24 that she joined one on behalf of her client Ms. Wrigley
25 is -- she testified -- Brian Raphan on behalf of Brian

1 Raphan P.C. testified that they did not know what a
2 common interest was. Mr. Raphan said that other than
3 assuming, he wouldn't know.

4 UNIDENTIFIED SPEAKER: (Ui).

5 MR. KATZ: In addition, I would say that her
6 communications would clearly be work product. There
7 was no indication that a communication to her would
8 increase the likelihood that the plaintiffs would get
9 those documents.

10 MS. ABRAHAM: As far as -- as far as the
11 work product claims, as we addressed in our reply, we
12 believe that any work product has been waived with some
13 of the disclosures and sharing the documents with
14 people who did not agree to keep it confidential,
15 sharing documents with people who admitted to sharing
16 communications with Bernard Black, sharing the
17 documents with people who had fiduciary duties to
18 plaintiffs.

19 MR. DAIN: The documents that were shared
20 with Mr. Black were documents that were part of a
21 stipulated accounting that Mr. Black had stipulated to
22 with all the other parties, so that would have been
23 providing information that was relevant to all parties.
24 That's separate from information that is relevant to a
25 common interest in defending against Bernard Black.

1 With Ms. Cohenson, the testimony is taken out of
2 context. It was more related to her understanding of
3 what a common interest covers and what it is, not
4 whether her communications would be confidential under
5 it.

6 Ms. Cohenson is a probate attorney so she's
7 not a litigator per se. So it would be under -- it's
8 understood that she wouldn't have, you know, the best
9 grasp of common interest agreements because she may
10 have never entered into one before this. But she was
11 clearly a potential defendant, then a defendant. She
12 was representing Ms. Wrigley, who was a potential
13 defendant and defendant. So taking testimony out of
14 context to try to say she denied the common interest
15 agreement is really specious.

16 THE COURT: When was the first time that
17 Bernard Black threatened a lawsuit against --

18 MS. ABRAHAM: Other than what defendants are
19 saying here, we --

20 MR. DAIN: If you're asking me, the first
21 time he threatened Ms. Wrigley was in September of
22 2014. He began threatening the others shortly
23 thereafter and there are documents we've uncovered that
24 we need to bring to the attention of the Court
25 separately that between September of 2014 and maybe the

1 first quarter of 2015, there were the beginnings of a
2 determination that they were going to potentially bring
3 an action against other parties.

4 The ones that are particularly related to
5 Ms. Wrigley and me would have been September of 2014.
6 Then probably during the first quarter of 2015 is when
7 Ms. Curr was beginning her forensic examination and we
8 started discovering these checks. Then I think Mr.
9 Salzman had a conversation with the attorney in court
10 that had indicated to him that Bernard was going to sue
11 for exactly what he's suing for here, a conspiracy to
12 breach fiduciary duty. So I would say for everybody,
13 probably somewhere around the first quarter of 2015 to
14 maybe early summer 2015.

15 THE COURT: So these -- the communications
16 that are at issue, were they about the Colorado action,
17 the New York action, or some combination thereof, and
18 the potential for a lawsuit by Mr. Black?

19 MS. ABRAHAM: They appear to be primarily
20 about the New York guardianship and the Colorado
21 proceeding.

22 MR. DAIN: The communications are about the
23 Colorado litigation, which is related -- it was related
24 to the guardianship proceeding in New York because the
25 idea was, the conservatorship in Colorado was to be

1 transitioned to the guardianship proceeding in New
2 York. So the forensic accounting, the uncovering of
3 the civil theft was all interrelated. But then there
4 are communications that are related therein beyond that
5 to strategy because it was now involving Colorado, it
6 was involving New York, and it subsequently started
7 involving the potential of Bernard suing everyone.
8 Then in January of 2016, he began those suits.

9 Your Honor, if I could just add, it was I
10 think very early in 2015 if not late 2014 when we first
11 learned in the guardianship proceeding that Mr. Black
12 had admitted in an affirmation that he had diverted a
13 third of the assets and quoted a false order, an order
14 that didn't exist that allowed him to do that. So that
15 would have been part and parcel of a joint strategy as
16 well, as to how we were going to get Joanne's stolen
17 money returned. So I can say that would have been as
18 early as December of 2014 or January, 2015.

19 That's how the guardianship proceeding in
20 New York interrelated, because Mr. Black was affirming
21 -- and I should say the probate proceeding as well.
22 Mr. Black was affirming in those proceedings that he
23 had transferred the money and that's what led to the
24 subsequent freezing of assets and the holding of a
25 trial and all proceedings. So the threats may have

1 begun against the two of us in September but by late --
2 either December, 2014 or January, 2015, we were already
3 becoming aware of the theft, and that required the
4 group, from Ira Salzman to Gail Young to Lisa DiPonio
5 (ph) to Ms. Wrigley and Mr. Pinto, to begin
6 strategizing how we were going to protect Joanne from
7 this deprivation.

8 When Ms. Curr was appointed subsequently --
9 not appointed, was hired, my bad -- was hired shortly
10 after that, and then when Ms. Cohenson came in the
11 picture probably in early 2015 as well, that all became
12 part of the team. In fact, it was called team Joanne
13 because we were all the ones protecting her from
14 Bernard and trying to determine the full extent of what
15 he had done, so there would have been communications.
16 Even if a communication said guardianship of Joanne
17 Black, it would have been related to that, to
18 uncovering the theft, to uncovering the other
19 malfeasance.

20 So all of those things would have been
21 interrelated and as I said, we had multiple discussions
22 about a common interest agreement over the next few
23 years, multiple drafts. Ultimately, we had a draft
24 that was signed that was in the draft state. It was
25 meant to extend back to the entire period of the oral

1 common interest agreement.

2 MR. SCHAAALMAN: Your Honor, I don't know if
3 you want a response. Mr. Dain is obviously testifying.
4 He hasn't been sworn in this matter. Despite all the
5 obfuscation, it's really pretty simple. We have people
6 who are supposedly part of this common interest who say
7 they don't know anything about it. Ms. Cohenson (ui).
8 Ms. Curr testified she never discussed the confidential
9 nature of such communications with the person who
10 retained her. It's very clear she wasn't talking about
11 one particular communication but all these
12 communications. People have to understand that what
13 they're engaged is confidential.

14 If this was such a great, organized team
15 effort, supposedly, as Mr. Dain has expounded, they
16 would have had a written agreement much, much earlier.
17 We're talking about communications in 2014, 2015, and
18 early '16. The written agreement does not occur until
19 2018. How many iterations would they have had to have?
20 How many carriers would they have had to have? In
21 fact, Mr. Dain has provided for the first time
22 information that the carriers weren't necessarily on
23 board and were permitting their lawyers apparently in
24 engaging in common interest participation or
25 communication because they were concerned about the

1 various representations in multiple matters.

2 They have abused -- they have abused the
3 whole notion of common interest and joint defense. It
4 pervades every single document that they have withheld.
5 They have privilege logs in the hundreds, not with
6 attorney/client privilege but with common interest and
7 joint defense. It's very clear they had all kinds of
8 individuals who were involved, who should not have --
9 could not possibly have been made to participate in a
10 confidential, privileged matter or an exception to the
11 waiver of privilege, not to mention that --

12 THE COURT: Except all of those people
13 ultimately ended up as defendants.

14 MR. SCHAAALMAN: Not all. That's not true.
15 Gail Young is not a defendant, Lisa DiPonio is not a
16 defendant.

17 MR. FANTONE: They were both main defendants
18 in this action.

19 MR. DAIN: They were.

20 MR. FANTONE: They were both main
21 defendants.

22 MR. SCHAAALMAN: They're not actively
23 defendants and we're talking --

24 THE COURT: That's not the question, whether
25 they're actively defendants.

1 MR. SCHAALMAN: We're talking about
2 communications prior to them being sued and we're
3 talking about years before Mr. Dain, again testifying,
4 claims that there were all these threats and
5 allegations of litigation. If there really were, if
6 everyone were fearful of that, then they would have sat
7 down and would have created a document, and they would
8 have certainly made it clear to all of the individuals
9 who were involved what a common interest is.

10 To say that Ms. Cohenson, because she's a
11 trusts and estates lawyer, wouldn't have any
12 understanding of a common interest joint defense is
13 facetious. She said, I didn't know what it was. Brian
14 Raphan, speaking on behalf of his law firm said, I have
15 no idea what that even is. You can't participate in
16 one of these unless you have some idea that this is a
17 collective effort to keep matters confidential as an
18 exception to the waiver of the attorney/client
19 privilege.

20 MR. DAIN: Your Honor, there's case law that
21 common interest can be created by conduct, so Mr.
22 Schaalman is not -- is speaking out of school. You can
23 create a common interest by your conduct in acting in
24 furtherance of a common strategy.

25 Please, don't take out of context, Mr.

1 Schaalman, my statement about carriers. That's a
2 common thing that people -- it didn't even have to be
3 related to that. If you have one litigation,
4 generally, there may be a belief, well, we should have
5 a common interest for this one lawsuit and you have a
6 common interest for another lawsuit. But if they
7 overlap, then you may have difficulties in creating a
8 written common interest agreement that would cover
9 everything in the same way, so please don't take that
10 out of context, too.

11 But the bottom line is, everybody was named
12 as a defendant. The fact that they got out of it is
13 not relevant, and I don't have to testify. There are
14 documents that were filed going back to the affirmation
15 of Mr. Lamberti on behalf of Bernard Black in the
16 Surrogate's Court proceeding, in which he reveals for
17 the first time that Mr. Black had diverted a third of
18 the assets and based it on a -- I mean, he had a quote
19 from an order that was a fictitious order. So we can
20 relate to the documents that are on file way back then.

21 You deposed me if you wanted testimony. I
22 explained to you about Mr. Black's threats. You had
23 every opportunity if you wanted me to testify, but the
24 bottom line is, in every one of these cases, you're
25 trying to attack the common interest. Judge Kanelly

1 issued an order regarding the common interest and Gail
2 -- I mean and Pam Curr was covered under that.

3 In every one of these cases, there was a
4 common interest between -- as a potential defendant and
5 as a defender of Joanne. And even -- and taking out of
6 context where one person says -- you asked them, what
7 does the common interest mean? If you're a litigator,
8 you can regale on it. If you're a trusts and estates
9 attorney, you may just have an understanding that
10 everything is privileged but you don't know all the
11 details and the law on common interest. I mean, Mr.
12 Schaalman himself doesn't. So the bottom line is,
13 they're trying to breach what has clearly been a common
14 interest among all these parties for years.

15 THE COURT: What case was the -- you said
16 there was a decision by Judge Kanelly. What case was
17 that in?

18 MR. SCHAALMAN: In fact, your Honor, Judge
19 Kanelly did not rule in that regard because there was a
20 production of privileged and joint defense documents
21 made subject to a stipulation in which there would be
22 non-waiver. That at a minimum should be what the Court
23 does here, and that says, you ought to produce all
24 these documents to claim privilege where you claim
25 joint defense and common interest without a waiver that

1 could be established at a trial. But in the meantime,
2 we are entitled to see those documents because despite
3 -- again, Mr. Dain's testimony and recitation of all
4 kinds of documents that are not before the Court --
5 they're not part of anybody's submission here.

6 The fact of the matter is that Judge Kanelly
7 in fact didn't have to rule on these because in fact
8 there was a stipulation that they would not -- that
9 joint defense/ common interest would not be waived but
10 the documents would be produced. So in the Northern
11 District of Illinois case, the defamation case, which
12 is set to go to trial on the 20th of August, those
13 documents are still available and there has been no
14 ruling by a court on those documents. Mr. Dain knows
15 that full well.

16 MR. DAIN: Mr. Schaalman, Mr. Schaalman,
17 there was a ruling and Ms. Curr was covered under that.
18 What you're talking about is, there was a subsequent
19 demand for further production of documents, where Judge
20 Kanelly said if he had to go through all these
21 documents, then one party or the other was going to be
22 sanctioned, the party who brought the motion or the
23 party who was defending. And what he said is, you guys
24 through it and you see what you can do. And what came
25 out of that was a stipulation for further documents, to

1 produce further documents subject to an attorney/client
2 privilege right that could be asserted after the fact,
3 and that was done for convenience.

4 But Judge Kanelly did issue an order that
5 Pam Curr, irrespective of being a forensic accountant,
6 was covered and could be covered by a common interest
7 agreement. So it's in the Illinois federal litigation
8 that Kate Black nee Litbeck (ph) brought against Ms.
9 Wrigley, Ms. Curr, and Ms. Cohenson, who has now been
10 dismissed out of that case.

11 MR. SCHAAALMAN: And in fact, the documents
12 covered by Ms. Curr or part of the stipulation in those
13 documents were produced. So if Ms. Curr thought that
14 there was some extraordinary reason why she would not
15 have to produce those documents, she would have done
16 so. In fact, the majority of the documents that
17 produced such a stipulation waiver were from Ms. Curr.

18 MR. DAIN: There is not a waiver. Mr.
19 Mancilla and Mr. Fantone can speak to it better but
20 that's the point. That's what we raised to your Honor
21 in an earlier motion, that they were trying to use
22 those documents in this case and they were covered
23 under an attorney/client privilege protection, but I'll
24 let them speak to that.

25 MR. FANTONE: Judge, what happened was,

1 there was probably close to a thousand documents, and
2 the parties just agreed, instead of fighting over it,
3 not to do production pursuant to a stipulation, non-
4 waiver, and confidentiality. That covered a majority
5 of the production. However, there were still select
6 documents that the parties chose to stand their ground,
7 so to speak, on their claims. Judge Kanelly did issue
8 a ruling, which I can read from the last paragraph
9 here. This is in case number 17-CV-101. It's document
10 229 filed November 15th, 2018. I'm starting at the
11 bottom of page 2 and I'm reading the last paragraph
12 before the conclusion on page 3.

13 It says, "Document Curr 1845 consists of
14 Curr's comments to counsel regarding allegations in a
15 lawsuit against her. It's protected by attorney/client
16 communication as well as work product. The remaining
17 documents consist of a series of email exchanges, most
18 of them overlapping with each other. They involve
19 various members of a large collection of people, some
20 lawyers, some not. Defendant Wrigley, Attorney Lisa
21 DiPonio, Wrigley's brother Anthony Dain, who is an
22 attorney, attorney Ira Salzman, defendant and attorney
23 Cohenson, defendant Curr, someone with the email
24 address dezen@q.com (Ph) [that's Gail Young], attorney
25 Melissa Schwartz, attorney Michael Custon (ph), and

1 perhaps others. These emails concern discussion about
2 settlement, pending litigation, and litigation
3 strategy. They're all protected work product, if
4 nothing else. Again, the court sees no viable basis
5 for a claim of waiver. The non-lawyers involved all
6 had common interest in connection with all sorts of
7 pending and anticipated litigation even if they did not
8 have written agreement to this at the time. Dain was
9 not a party to the litigation but it's clear from the
10 contents and context of the emails that he was
11 participating not just as Wrigley's brother but also
12 because he was providing input as an attorney."

13 I'm happy to provide a copy of this. I
14 don't have a hard copy for you but we can give you the
15 whole decision.

16 THE COURT: So is it fair to say that you've
17 already produced most of these documents just pursuant
18 to that stipulation?

19 MR. FANTONE: Yeah, but the purpose of the
20 stipulation, having been part of those discussions with
21 procurement, was specifically to prevent their use in
22 collateral proceedings, including this one.

23 THE COURT: Gotcha.

24 MR. SCHAALMAN: There are more documents --
25 we now have privilege logs that are much larger than

1 the privilege logs that were produced. We have Mr.
2 Salzman's privilege log. There was no privilege log
3 from Mr. Salzman in the Chicago case, where Mr. Dain
4 wasn't a party. Now we have a much larger privilege
5 log and we have a larger privilege log of Ms. Cohenson
6 and Mr. Raphan. We know that there are a lot of
7 emails. We know there were very extensive
8 communications which are germane and relevant to this
9 case, as to their attempts to aid and abet the breach
10 of fiduciary duty. I don't think Judge Kanelly's order
11 reached any of the things that we're talking about now.

12 MR. DAIN: Your Honor, Mr. Schaalman just
13 got through telling you there was no such order. That
14 order is as clear as it could be. The communications
15 that were produced -- as counsel said, it's not all
16 communications. There are some that are absolutely
17 beyond question. The only ones that were produced were
18 ones where, could there be an argument, and those have
19 been produced in this case. The ones that are withheld
20 are the ones that are clearly privileged in this case
21 and were meant not to be produced in this case. Now
22 Mr. Schaalman went from saying there's no such order,
23 it doesn't exist, to now saying, yeah, there's an order
24 but now we have a broader privilege log. Well, of
25 course, because every production request they issue is

1 different, so you'll have maybe less, you'll have maybe
2 more, as you saw earlier in this case. But clearly, if
3 you take Judge Kanelly's order, that paragraph, it
4 couldn't be more clear. There was a common interest
5 agreement and we're part of it, and those documents are
6 protected.

7 Counsel hasn't shown with any specificity
8 what he believes shouldn't still be covered by that.
9 By the way, he has some produced documents from the
10 other case that are maintained as privileged but not to
11 be used in this case. He hasn't even discussed with us
12 -- met and conferred and discussed with us why he
13 somehow thinks they should be. He just brought this
14 motion. So the motion should be denied and I think you
15 could -- I mean, Judge Kanelly to me couldn't have said
16 it better.

17 THE COURT: It sounds to me like Judge
18 Kanelly unfortunately had the benefit of seeing some of
19 these documents.

20 MR. SCHAAALMAN: Yeah. And, your Honor, of
21 course, the order that Mr. Dain is talking about also
22 provides -- and I think the Court ought to read the
23 order.

24 THE COURT: Does anyone have the order?

25 MR. SCHAAALMAN: I have it in my computer,

1 sure.

2 MS. ABRAHAM: It's touch screen so you can
3 scroll.

4 THE COURT: Clearly, the judge recognized
5 there was a common interest for all of the same players
6 that are here. I'll tell you what. Why don't you
7 produce to me for in camera inspection the documents,
8 at least the ones that have already been produced. So
9 both sides already have them, even though they're not
10 technically supposed to be used in this case.

11 MR. FANTONE: (Ui).

12 THE COURT: Yeah.

13 MR. FANTONE: I think there's -- we have no
14 problem doing that. I just want to forewarn the Court,
15 I think there's probably close to a thousand pages or
16 more.

17 THE COURT: Okay. Well, I'm not saying I'm
18 going to necessarily read every single page.

19 MR. FANTONE: Yeah.

20 THE COURT: But at least I want to have some
21 context for some of this.

22 MR. FANTONE: We can do that.

23 MR. MANCILLA: Can we limit it to responsive
24 documents? I'm not sure that -- these are documents
25 produced in response to (ui).

1 THE COURT: Different case, yeah. The only
2 reason I said that might be a starting place is because
3 both sides have those documents, so it might be easier
4 to talk about them once I review them. If we're
5 talking about other documents that the other side
6 doesn't have --

7 MR. FANTONE: It might be better if the
8 plaintiffs identify which documents, so your Honor can
9 read a select few of those documents -- otherwise --
10 this is speaking perhaps as your law clerk, not to
11 review all of these documents.

12 MR. SCHAAALMAN: We'd be glad to do that. I
13 think that's a reasonable suggestion. We'll submit --

14 THE COURT: Look, you both have those sets
15 of documents.

16 MR. SCHAAALMAN: We do.

17 THE COURT: Why don't you confer and just
18 agree on a set to provide to me that gives like an
19 overview of the types of documents we're talking about.

20 MR. SCHAAALMAN: That's fine.

21 THE COURT: So that I have some context for
22 the -- because, look, this is a highly fact-specific
23 inquiry.

24 MR. SCHAAALMAN: Sure.

25 THE COURT: Sometimes it's hard for me to

1 make these decisions without seeing them. As much as I
2 hate reviewing all of this stuff in camera all the
3 time, I often find that these privilege questions are
4 difficult to address without actually looking at stuff.

5 MR. FANTONE: All right, we can work it out.
6 Just by way of example, in the conversation we had
7 earlier, the requests in the Illinois case were much
8 broader than what plaintiffs -- at least on behalf of
9 Wrigley.

10 THE COURT: Okay.

11 MR. FANTONE: Pinto wasn't even a part of
12 that case.

13 MR. SCHAAALMAN: We'll see if we can agree to
14 a subset that applies to (ui).

15 MR. FANTONE: Okay.

16 THE COURT: Look, either agree to subset or
17 submit the whole darned thing.

18 MR. SCHAAALMAN: Right.

19 THE COURT: But I'll very disappointed in
20 you if you make me read the whole thousand pages.
21 Let's put it that way.

22 MR. SCHAAALMAN: Understood.

23 MR. FANTONE: In plaintiffs, right, your
24 Honor?

25 MR. SCHAAALMAN: In the truth-seeking

1 process, of course.

2 THE COURT: Why don't we pick a date to come
3 back so we can resolve this issue, unless there's
4 something else coming up that you think we need to
5 address.

6 MR. KATZ: There are a few other issues,
7 unfortunately. One is, Bernard Black is supposed to be
8 deposed tomorrow.

9 THE COURT: Okay.

10 MR. KATZ: We got an email from one of his
11 attorneys. Mr. Schaalman was on the email. He
12 indicated that -- we had noticed it for a court-
13 reporting office in midtown. His attorney indicated he
14 refuses to appear there. He'll only appear at his
15 lawyer's office. We've already set this up with a
16 videographer. I don't understand why Mr. Black refuses
17 to appear at where we noticed the deposition, so that's
18 an issue.

19 MR. FANTONE: Whish is at the court-
20 reporting office.

21 MR. KATZ: Right. Esquire, in midtown. So
22 that's an issue. There's an outstanding issue about
23 finishing Katherine Black's deposition, and then I
24 think there's an issue about the current expert
25 deadline for us to serve reports because I think

1 clearly from taking Katherine Black's deposition
2 yesterday, which was not finished in the seven hours
3 for all defendants, Bernard Black's deposition, I'm
4 very confident, is not going to be finished within a
5 day for all defendants. There are so many issues that
6 have to be addressed. Then I think we need a further
7 extension of our deadline to serve reports because by
8 the time we finish these depositions and get the
9 transcripts, we're not going to be able to do it by the
10 current deadline.

11 THE COURT: Okay.

12 MR. SCHAALMAN: Let me address the first
13 issue. Mr. Black would prefer to have his deposition
14 at his attorney's office. He has made an accommodation
15 by coming to New York. He's not a party to this case,
16 he's a (ui) witness. I don't think it's a lot to ask
17 that we move the deposition. There is room for the
18 videographer. We emailed the other side. Mr. Katz
19 said he would check if there was room in the lawyer's
20 office. I think it's a small, incidental request, your
21 Honor, that Mr. Black would prefer that.

22 I know the videographer is not wedded to the
23 court reporter's office. He does depositions all over
24 the city, and I'm sure he'll be glad to show up at Mr.
25 Sunder's (ph) law office as much as he would go to the

1 court reporter's office. So I think that's a very
2 small -- and I don't really understand what the major
3 objection was. The only questions raised by Mr. Katz
4 when we made the request was, is there a conference
5 room big enough? Can everybody fit? Can you do the
6 videographer? The answer came back yes, the conference
7 is large enough, the videographer can be accommodated.
8 So I don't think this is really a major issue which the
9 defendants (ui).

10 MR. FANTONE: Your Honor, I don't know why
11 plaintiff's counsel continues to assert that he is not
12 a party. He is the plaintiff in the 430 matter, which
13 we've agreed these depositions count for both of those
14 cases. Both Mr. Schaalman and Mr. Grayson have
15 asserted that repeatedly for other witnesses as well.

16 MR. MANCILLA: And Samuel Black, who is a
17 plaintiff in the 403 action.

18 MR. DAIN: Your Honor, he didn't just
19 request a transfer. He said he will not show up. He
20 will refuse, so there's something going on here that's
21 more than just a request. He's using this kind of as a
22 sworn.

23 THE COURT: It's noticed for the court
24 reporter's, right?

25 MR. KATZ: It's not even at my office.

1 THE COURT: So it's at a neutral site.

2 MR. KATZ: Correct.

3 THE COURT: Do it at a neutral site.

4 There's no reason why -- I mean, this is the kind of
5 stuff that's just silly. There's absolutely no reason
6 why it can't be done at the court reporter's.

7 MR. SCHAALMAN: As to Mrs. Black, she was
8 deposed yesterday for seven hours. She has a trial
9 coming up starting I believe on the 20th of August. She
10 just came back from Israel. She's still (ui) because
11 she had a broken ankle and she still finds it difficult
12 to travel. She resides now (ui). We have agreed to
13 have her deposition taken on the day after the trial
14 ends in Chicago, in Chicago, where she resides.

15 THE COURT: Okay.

16 MR. SCHAALMAN: The only part that has not
17 -- Mr. Dain has appeared by telephone. It should make
18 no difference to him where this deposition -- Mr. Katz
19 has finished his questions. He had seven hours. He
20 didn't allocate any time for his codefendants. Ms.
21 Wrigley and Mr. Pinto are the principal defendants and
22 we they have to finish up. Her lawyers are going to be
23 in Chicago and we will take the deposition immediately
24 after the trial is over. We can do it on a Saturday if
25 need be. If the case goes on to Saturday, we'll

1 accommodate that in Chicago at a law office, and she
2 will be there.

3 There's no reason for her to come back to
4 New York to take this deposition. I made this proposal
5 to them in writing this morning. They asked for
6 proposal, I made it. She would be willing to sit for
7 another three hours for her deposition, so that means
8 in total, she would have sat for ten hours for her
9 deposition. I would assume that that's more than
10 adequate to get her deposition taken, given the fact
11 that she's basically appearing here as a plaintiff on
12 behalf of her minor children. She's their guardian. I
13 think that's a very reasonable approach. It's a
14 compromise and I don't understand why defendants, who
15 are going to be in Chicago anyway --

16 MR. MANCILLA: Your Honor, first of all, we
17 spoke to Mr. Schaalman before this proceeding. The
18 trial is not ending before the 24th. He knows that and
19 he's just continuing to represent to the Court -- the
20 trial is expected to go from the 20th to the 29th or
21 28th.

22 MR. SCHAAALMAN: He misunderstood me and I
23 clarified this before we started. I thought the trial
24 was over by the 24th.

25 MR. MANCILLA: And you were mistaken,

1 correct?

2 MR. SCHAAALMAN: I was mistaken.

3 MR. MANCILLA: So don't make that
4 representation to the judge.

5 MR. SCHAAALMAN: No, I told you this before
6 we started. There's no reason now for you to say that
7 I mis-stated this to the Court. I just said when the
8 trial is over, Ms. Black will be appearing -- will be
9 willing to be deposed in Chicago for three hours.

10 MR. MANCILLA: On the 24th?

11 MR. SCHAAALMAN: Whenever the trial ends.
12 When is the trial going to end, Mr. Mancilla? Do you
13 know?

14 MR. MANCILLA: We're not sure yet.

15 MR. SCHAAALMAN: That's right, but she will
16 know because she is the plaintiff. So she will appear
17 the next day for her deposition in Chicago for three
18 hours.

19 MR. MANCILLA: There is another defendant in
20 this case, Melissa Cohenson and Brian Raphan, who we
21 also have not been able to question, and we should all
22 be afforded more time, both for her deposition and for
23 Bernard Black's deposition because these, number one,
24 are relating to two cases, and number two, these cases
25 are significantly -- are vast. We would request that

1 Ms. Black be deposed this week or next week, that her
2 continued deposition occur this week or next week, and
3 with Mr. Black, that we are allotted an additional
4 amount of time for Mr. Black's deposition.

5 THE COURT: Is she in New York right now?
6 When does she --

7 MR. SCHAALMAN: He will be in New York for
8 the deposition.

9 THE COURT: Ms. Black. She was just --

10 MR. SCHAALMAN: Ms. Black is back in
11 Chicago.

12 THE COURT: She's back in Chicago?

13 MR. SCHAALMAN: Where she resides. She has
14 two minor children.

15 THE COURT: I thought she was in Israel.

16 MR. SCHAALMAN: She was. She broker her
17 ankle in Israel so it's very difficult for her to
18 travel. She came in in a walking cast yesterday and
19 she's now back in Chicago.

20 MR. MANCILLA: We provided the 8th, the 14th,
21 and the 16th as potential dates for the continuance of
22 Ms. Black's deposition. Anticipating that we might not
23 be able to agree on it, we actually issue a notice for
24 the 16th at the neutral court reporter's office where we
25 conducted her first -- the first portion of her

1 deposition. Again, she is a plaintiff.

2 MR. SCHALMAN: I think that's the week
3 before the trial (ui).

4 MR. MANCILLA: The same trial that we're
5 attending.

6 THE COURT: Do you have a problem doing it
7 in Chicago? How much extra time do you need to do
8 this?

9 MR. MANCILLA: I would say probably at least
10 five hours, not that we intend to cover a lot of what
11 Mr. Katz has covered. But, again, this is --

12 THE COURT: I would hope not since you all
13 have a common interest agreement.

14 MR. MANCILLA: Yeah. It's just that there
15 are two separate cases so there's a lot of -- part of
16 agreeing to do these joint depositions is just going to
17 be --

18 THE COURT: I agree. Look, I'm willing to
19 give you some extra time because it's two cases.

20 MR. MANCILLA: Right.

21 THE COURT: Not necessarily because there's
22 multiple defendants. You guys just need to coordinate
23 better if that's your issue.

24 MR. SCHALMAN: I would just remind the
25 Court that I don't believe that the discovery in the

1 430 case is still open. I think we agreed that we
2 could use discovery in that case but to say that they
3 now have an additional reason to because of that other
4 case -- we've noticed in this case. We agreed that
5 once it's noticed in this case (ui).

6 THE COURT: Was she ever deposed in the
7 other case?

8 MR. SCHAAALMAN: No. They never requested
9 her deposition in the other case.

10 MR. MANCILLA: We agreed on a joint
11 discovery schedule, and I think I have emails with one
12 or two of them or maybe both of them, agreeing that the
13 depositions would be joint, in an effort to save
14 everybody money. It's frankly a little disingenuous
15 now to try to back out of that under these
16 circumstances.

17 MR. SCHAAALMAN: We're not backing out of any
18 agreement. I don't think you're stating what the
19 agreement was.

20 MR. MANCILLA: Okay.

21 THE COURT: Look, she's a plaintiff, she
22 brought the case in New York. If they want to do the
23 depositions in New York, she's going to have to do the
24 depositions in New York. If she can't do it next week
25 because she's in Chicago, then you're just going to

1 have to pick another day after the trial.

2 MR. MANCILLA: We still haven't been
3 informed that she's unavailable on the 14th or the 16th.
4 That question was never answered. Defense counsel is
5 available, all of us.

6 MR. SCHAALMAN: Well, Ms. Abraham has shown
7 me a transcript in which -- we were criticized by the
8 other side for not having provided notices in the other
9 case. But, your Honor, she's not available next week,
10 she's not available this week. It's going to have to
11 be after the trial. Again, your Honor, I know you feel
12 that she's the plaintiff. She's really a nominal
13 plaintiff. She is the guardian of the minor children.
14 The minor children certainly don't have to know the
15 facts in this case. They're 11 and 13, I believe, or
16 10 and 12. They're there because they are contingent
17 beneficiaries of the SNT.

18 THE COURT: Yeah, but if she didn't have
19 personal knowledge, it wouldn't take them ten hours to
20 depose her.

21 MR. SCHAALMAN: Well, that's an interesting
22 -- that's a whole nother question, why it takes them
23 ten hours.

24 MR. DAIN: Your Honor, I do want to say
25 she's not a nominal defendant. She drafted the

1 complaint.

2 MR. SCHAAALMAN: Having this done in Chicago
3 is just an eminently reasonable (ui).

4 MR. DAIN: She drafted the complaint in this
5 case.

6 MR. SCHAAALMAN: There is really no reason to
7 drag Ms. Black back to New York. I really think it's
8 terribly unfair. Again, two of the lawyers are going
9 to be there already and Mr. Katz has no more questions
10 to ask. He can certainly dial in. Mr. Dain has felt
11 very capable of dialing in and participating by phone.

12 MR. DAIN: Your Honor --

13 MR. SCHAAALMAN: This isn't done for any
14 reason other than (ui).

15 MR. DAIN: Ms. Black is not a minor
16 plaintiff. She drafted the complaint, she orchestrated
17 the litigation. It's clear by saying that she
18 represents the two minor children -- of course, we
19 can't depose the two minor children. They don't the
20 facts, she does. She drafted the entire complaint,
21 two-hundred-and-some pages of it. That's why obviously
22 with that case and the other case, it's taking longer.
23 I just wanted to make that clear. I think five hours,
24 if we could get five hours, would be sufficient, but
25 I'll let the other attorneys address who were in New

1 York -- Mr. Katz may have followup questions after
2 we're done, and Mr. Schaalman may ask some questions
3 that lead to followup questions.

4 MR. SCHAAALMAN: Whether she drafted the
5 complaint, whether she knows things, it has more to do
6 with the time that it takes. She clearly, in terms of
7 where she should be deposed, is a nominal plaintiff at
8 best. If she weren't the guardian of these two minor
9 children, if she were merely a witness, we would have
10 never done this deposition in New York. We would have
11 done it in Chicago. Everybody knows that and this is
12 only to make her life more difficult. She has two
13 young children, she's facing another trial that she's a
14 plaintiff in, which is going to trial on the 20th of
15 August. I just think this is a very reasonable
16 accommodation and I think the Court has the power to do
17 that.

18 THE COURT: Look, in the first instance, if
19 you knew that this deposition was going to take over
20 seven hours, you should have either agreed on something
21 ahead of time or if you couldn't agree, you should have
22 brought it to my attention ahead of time instead of
23 waiting until after your seven hours are up and now
24 asking for more time. You could have coordinated
25 things better. You certainly could have coordinated it

1 so that the New York attorneys asked their questions
2 while she was in New York, and then the lawyers that
3 were going out to Chicago could finish up while she's
4 in Chicago. At the very least, if you knew it was
5 going to be over multiple days, you could have had two
6 successive days just to get it over with, instead of
7 letting her go all the way back to Chicago and now
8 forcing her to come back.

9 THE COURT: Where does Bernard Black live?

10 MR. SCHAALMAN: In Chicago. He returned
11 from Israel. Both of them are starting their
12 tournament at Northwestern University Law School in the
13 next month or so, so they've come back for that.

14 MR. MANCILLA: Could we plan maybe to do
15 Bernard's deposition then on the 7th and the 8th, to
16 avoid those situations?

17 THE COURT: I think you should do it in two
18 successive days.

19 MR. MANCILLA: He's already going tomorrow
20 so then Thursday I believe is open. It's in between
21 actually -- we're doing another deposition of Samuel
22 Black on the 9th.

23 MR. SCHAALMAN: I'm not available. I'm
24 leaving, your Honor. I'm going to Chicago (ui).

25 MR. MANCILLA: Did you plan on asking him

1 any questions because I think he's going to be
2 represented by separate counsel. Ms. Besunder is going
3 to be there, at the office at which he's requesting to
4 take his deposition. So he has independent counsel
5 appearing on the 7th and the 8th. I don't want to speak
6 out of turn but Mr. Schaalman -- I don't expect him to
7 ask any questions of Mr. Black.

8 MR. SCHAALMAN: You're incorrect. I'm
9 representing (ui). Now we're not using the offices
10 (ui). We're going to Esquire Court Reporting, as the
11 Court has just indicated.

12 MR. MANCILLA: So Ms. Besunder -- you don't
13 expect her to attend?

14 MR. SCHAALMAN: I don't know.

15 THE COURT: I'll give you four extra hours
16 for both Mr. and Mrs. Black.

17 MR. MANCILLA: Is that four each, your
18 Honor?

19 THE COURT: Four total for each.

20 MR. MANCILLA: Four each, right, four for
21 Ms. Black and four for Mr. Black?

22 THE COURT: Yeah.

23 MR. MANCILLA: Okay.

24 THE COURT: I thought you were saying four
25 each for each of you.

1 MR. MANCILLA: No. Judge, I'm sorry, I
2 didn't mean to -- I'm sorry for making a confusing
3 comment.

4 THE COURT: When is Mr. Black supposed to go
5 to Chicago?

6 MR. SCHAALMAN: Your Honor, I don't know
7 but, again, he would be willing to be deposed in
8 Chicago on the same day that Ms. Black is being
9 deposed. The suggestion that the Court has made -- if
10 Mr. Katz will share his time with counsel for Ms.
11 Cohenson tomorrow, I don't imagine he'd have much to
12 ask. At this point, then the New York phase would be
13 finished and we could do the deposition in New York, in
14 Chicago along with Ms. Black because, again, Ms.
15 Wrigley and Mr. Pinto (ui) Mr. Dain (ui). Again, it
16 would be quite efficient. Then we have another long
17 day, each for four hours, and we can do that in Chicago
18 (ui).

19 MR. MANCILLA: We have to coordinate airfare
20 and also get extensions or additional housing while
21 we're there. So it's really -- even though we're going
22 to be there for the trial, we're not doing this during
23 the trial and it's going to be an extra cost to us, not
24 to mention the work that we're missing staying out of
25 New York.

1 MR. SCHAAALMAN: But you don't even know how
2 long the trial is going to last. It could be a day
3 shorter than you believe and then we'd be able to get
4 these depositions done and you would not have stayed an
5 extra day.

6 MR. MANCILLA: Possibly.

7 THE COURT: I don't know how --

8 MR. MANCILLA: I highly doubt that.

9 THE COURT: I don't know how logistically
10 you're going to do it. Since you don't know exactly
11 when the trial is going to end, you're going to have to
12 have a court reporter on standby.

13 MR. SCHAAALMAN: That would really not be a
14 difficulty in Chicago.

15 THE COURT: No? All right.

16 MR. SCHAAALMAN: You can call them up the
17 same morning. We would certainly know the night
18 before, when the case goes to the jury.

19 MR. MANCILLA: I think that it's going to go
20 so long that the judge has already indicated that he's
21 probably going to set limits on us, so I think we're
22 going probably until the 28th or 29th, and we're set to
23 leave on the 31st. That's leaving a day for the jury.
24 I think that was the preliminary discussion, that the
25 testimony would go to the 29th and then we get one day

1 for the jury, and we're set to leave on the 31st.
2 Again, I'm really not trying to be difficult. It's
3 just, candidly, these are the costs that we would have
4 to incur to accomplish this.

5 MR. SCHAALMAN: While the jury is out,
6 certainly one of the two of you who are trying the case
7 could certainly do the depositions.

8 MR. MANCILLA: We certainly could not do a
9 deposition of Ms. Black while the jury is out because
10 jury notes that come in -- those are issues that are
11 taken up on appeal pretty regularly.

12 MR. SCHAALMAN: One of you could be sitting
13 and waiting for the jury and the other could be taking
14 the deposition. You have two lawyers. Yeah, but we're
15 not asking to take the deposition.

16 MR. MANCILLA: Bernard could stay an extra
17 day on the 8th and she can handle it.

18 MR. SCHAALMAN: I don't know what his
19 schedule is. You haven't noticed for it. You noticed
20 yesterday -- you noticed one day. You didn't notice
21 more than one day for Bernard.

22 MR. MANCILLA: We noticed Katherine Black
23 for next week.

24 MR. SCHAALMAN: Yesterday, while she was
25 taking her deposition, they cutely served a notice on

1 us for next week. Yes, you did, but you didn't do that
2 -- even last night, you didn't do it for Bernard for
3 another day.

4 MR. MANCILLA: We were having that
5 discussion.

6 MR. SCHAALMAN: Bernard is here for one day.
7 He's here for one day, as far as I know. I don't know
8 what his schedule is.

9 MR. MANCILLA: Why don't we call him and
10 avoid all this bickering. Can we make one phone call
11 quickly to ask him if he's available on the 8th?

12 MR. SCHAALMAN: I already told you I'm not
13 available on the 8th.

14 MR. MANCILLA: But you've got two lawyers,
15 as you just reminded us of.

16 MR. SCHAALMAN: I'm the one he's asked to
17 defend the deposition. If he's available on the 8th, we
18 might be able to make it work, but I don't know that he
19 is. I can't make a commitment to the Court on that.

20 MR. MANCILLA: It's 4:04 in Chicago. You
21 can't just call him right now to try to --

22 MR. FANTONE: He should be here. His
23 deposition is tomorrow at 9:00 a.m.

24 MR. MANCILLA: Oh, right.

25 THE COURT: Look, I'm not dealing with this.

1 You guys figure out the logistics. This isn't rocket
2 science. Figure it out. Whatever you end up doing,
3 you end up doing. If you can't agree on stuff and you
4 want to file a motion for costs, go for it.

5 MR. MANCILLA: Okay.

6 THE COURT: But I'm not going to try to
7 coordinate your schedules.

8 MR. MANCILLA: Fair enough.

9 THE COURT: You'll figure it out on your
10 own. Anything else?

11 MR. KATZ: I think the last thing, Judge, is
12 just the deadline for the defendants to serve their
13 expert reports, which is currently I believe September
14 9th. But as a result of us not going to be finished
15 with these depositions, it looks like --

16 THE COURT: Why don't you finish the
17 depositions first and then you'll have a better idea of
18 how long you need. You can just put in a written
19 request to extend the deadline.

20 MR. KATZ: Okay.

21 THE COURT: I don't want to just arbitrarily
22 pick a day now. You don't even know when these
23 depositions are going to be done.

24 MR. KATZ: That's fine. I just wanted to
25 make sure that we would be able to get an extension

1 given that the schedules are being extended.

2 THE COURT: That's fine.

3 MR. KATZ: Thank you, your Honor.

4 MR. SCHAAALMAN: I don't want to test the
5 Court's patience but I just want to make sure I
6 understand what you're asking us to do. Are you asking
7 us to negotiate also the possibility of Katherine
8 Black's deposition being taken in Chicago?

9 THE COURT: I'm asking you to discuss all of
10 the logistics of the two depositions and try to come to
11 an agreement for both of them that is most convenient
12 for the most number of people.

13 MR. SCHAAALMAN: Thank you.

14 THE COURT: And if you can't do that and you
15 end up having to do something that's inconvenient and
16 you want to make a motion for costs on that basis,
17 either side is more than welcome to do that.

18 MR. KATZ: Thank you, your Honor.

19 MR. MANCILLA: Thank you, your Honor.

20 MR. DAIN: Thank you, your Honor.

21 THE COURT: All right, have a good day.

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I certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter.

A rectangular box containing a handwritten signature in black ink. The signature appears to be 'E. Barron' with a long horizontal stroke extending to the right.

ELIZABETH BARRON

May 11, 2020